

RECEIVED  
BARRISTER,  
MORNWALL, ONT.

THE  
JUDICATURE ACT AND RULES  
1881,

49  
5105

AND  
OTHER STATUTES AND ORDERS

RELATING TO THE PRACTICE OF THE  
SUPREME COURT OF JUDICATURE FOR ONTARIO,

WITH NOTES,

BY  
THOMAS WARDLAW TAYLOR, Q.C.,  
*Master-in-Ordinary of the Court of Chancery for Ontario;*

AND  
JOHN S. EWART,  
*Of Osgoode Hall, Barrister-at-Law.*

---

TORONTO:  
CARSWELL & CO., LAW PUBLISHERS.  
1881.



KE  
8816  
283  
T39

---

---

Entered according to Act of Parliament of the Dominion of Canada, in the  
year of our Lord 1881, by THOMAS WARDLAW TAYLOR and JOHN SKIRVING EWART,  
in the office of the Minister of Agriculture.

---

---

---

C. B. ROBINSON,  
PRINTER,  
5 JORDAN STREET.

---

A19217

## PREFACE.

---

A PREFACE, although usually without excuse or justification (save custom), may in this case be of some service. The Ontario Judicature Act, while based largely upon the English Acts, effects a more complete annihilation of all distinction between the jurisdictions of the Courts. In England the Chancery Division still retains exclusive jurisdiction over the various classes of actions which, under the previous practice, were more particularly within the category of Chancery causes; as, for example, administration, mortgage and partnership actions, and those with reference to trusts, specific performance, rectification of deeds, wardship of infants, etc., etc. The Ontario Act abolishes all distinction, gives each Court the jurisdiction formerly possessed by all of the others, and recognizes as the only ground for the transfer of an action from one Court to the other the necessity for the equalization of the business of the Courts, or the existence of some other action with which it should be connected. (O. XLV.)

### RULES OF LAW.

Special care has been taken to remove all conflict which heretofore existed between the Courts in respect of legal and equitable rights and interests. Sec. 17, after declaring the law in respect of waste, merger, assignments of debts, injunctions, receivers, and other matters, to be in accordance with the principles acted upon by the Court of Chancery, provides that "generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the Rules of Equity and the Rules of Common Law with reference to the same matter, the Rules of Equity shall prevail."

## COMMENCEMENT OF PROCEEDINGS.

All proceedings which were formerly commenced by bill or information in Chancery, or by writ at Law, are now to be commenced by writ. (O. I., r. 1.) This provision does not affect proceedings which were formerly commenced by petition, as in matters affecting lunatics and infants, or by notice, such as partition and administration actions; and the orders relating to these latter are expressly continued and made applicable to all the Courts. (O. I., r. 3.)

## PLEADING.

The system of pleading is an admixture of the Chancery and Common Law systems. It follows the latter in the use of replication and subsequent pleadings, instead of successive amendments of the bill and the filing of new answers; but in all other of its essential features it follows the former. All the technicalities of the special pleading which at law served to conceal to a large extent the real point in issue—all the common counts, the general issues (save that "by statute") are swept away, and the Chancery system of indicating in ordinary language the complaint and defence is substituted. "Each party in any pleading . . . must allege *all such facts* not appearing in the previous pleading (if any) as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as, if not raised on the pleadings, would be likely to take the opposite party by surprise." (O. XV., r. 23.)

There was perhaps nothing in the old systems in respect of which Chancery and Common Law were so completely at variance as in the mode of evolving the issues between the parties. The latter was the more logical and theoretically the better, but in practice beset by innumerable difficulties, arising perhaps from lack of sufficient familiarity on the part of the profession with the form of a syllogism, or rather an incapacity readily to reduce facts to syllogistic shape; while the former, although inartistic, was free from the embarrassment so often at law complained of in Chambers, and secured the

clear statement of the point in controversy between the parties. At Law every material allegation in a pleading had to be traversed or confessed and avoided, otherwise it was taken to be admitted. In Chancery it was not necessary, in order that the plaintiff should be put to the proof of every statement in the bill, that the answer should even suggest a doubt of the absolute truthfulness of every paragraph, for it was one of the General Orders of the Court that the silence of the answer as to any allegation in the bill was not to be construed as an implied admission of the truth of such allegation. Of these two systems England has adhered to the Common Law, and already her law reports are full of decisions as to embarrassing pleadings; Ontario has adopted the Chancery (O. XV., r. 24).

#### JOINDER OF CAUSES OF ACTION.

Multifariousness "has ceased to be an objection by the express enactment of the Judicature Act" (p. 257), and the plaintiff may now unite in the same action several causes of action (O. XIII., r. 1). These statements are subject, however, to qualification in regard to actions for the recovery of land (O. XIII., r. 2), and claims by an assignee in insolvency (O. XIII., r. 3), and subject also to the right of the defendant, in case he alleges that the causes of action cannot be conveniently disposed of in one action, to move for an order excluding one or more of the causes of action set up by the plaintiff.

#### JOINDER OF PARTIES.

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative (O. XII., r. 1), and all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative (O. XII., r. 3). For example, the plaintiffs were trustees of a charity, and deeming themselves libelled by words published by the defendant, united in bringing an action for the separate torts (*See* p. 180). Plaintiff made a contract with one defendant, acting as his agent for his co-defendant. An action against the

principal upon the contract, and in the alternative (if it should appear that the agent acted without authority) against the agent for falsely representing himself as duly authorized was sustained (*see* p. 181). While there is so much liberty in the joinder of causes of action and joinder of parties, there is nevertheless a close and well-defined limitation of the power. There must be either identity of the subject matter of the action, in which case all parties interested in that subject matter may be made parties; or there must be identity of parties, in which case various unconnected causes of action may be united, (*See* p. 213.)

#### COUNTER-CLAIM.

A new and extremely valuable feature of the practice is the right of counter-claim. By sec. 16, sub-s. 4, of the Act, a defendant may set up as against the plaintiff, by way of counter-claim, any cause of action whatever which he may have against him, whether connected with the plaintiff's claim or not, or whether it be for damages or otherwise. If the defendant's cause of action be against the plaintiff together with some other person not already a party to the action, he may still file his counter-claim, making the third person a party defendant; but in such case there is this limitation, that the cause of action so set up must relate to, or be connected with, the original subject of the cause or matter (*see* pp. 32-44). The Court may, however, on the application of the plaintiff exclude the counter-claim if it appears that it cannot be conveniently disposed of in the pending action (O. XV., r. 3b; *See* pp. 42-44).

#### THIRD PARTY.

Another new and excellent feature of the Act is the power given to a defendant, who claims to be entitled to contribution or indemnity or any other remedy or relief over against a third party, to notify such person of the pendency of the action, and thus bind him by the result. The person notified may, if he so desire, appear in the action and take an active part in the defence; but whether he do so or not he is estopped by the judgment from disputing any matter determined by it.

## TRIAL.

Combining the methods permitted by the old practice with those sanctioned by the new, there seems to be now a sufficient variety of modes in which, in contested cases, judgment may be obtained.

1. The parties may agree upon some issue or issues of fact which may by an order be sent down to trial, R. S. O., c. 50, s. 189, *et seq.*

2. The whole action may be compulsorily referred to arbitration, R. S. O., c. 50, s. 189, *et seq.*

3. Or it may be referred by consent of parties, R. S. O., c. 50, s. 201, *et seq.*

4. Questions arising in the action (but not the action itself) may be referred to an official referee or other person agreed upon for report, Ont. Jud. Act, s. 47.

5. Questions or issues of fact (but not the action itself) may be sent before an official referee or other person agreed upon for trial, Ont. Jud. Act, s. 48.

6. Necessary inquiries or accounts may be ordered to be made or taken at any time, notwithstanding that there is some special or further relief sought for, O. XXIX., r. 1, and see R. S. O., c. 48, ss. 26-29.

7. The parties may concur in stating questions of law in the form of a special case for the opinion of the Court, O. XXX., r. 1.

8. Or the Court or a Judge may direct a special case to be stated, O. XXX., r. 2.

9. If the writ be specially indorsed the plaintiff may, after appearance, apply for leave to sign final judgment upon an affidavit verifying the cause of action, and stating a belief that there is no defence, O. X., r. 1.

10. Any party, at any stage, may apply upon admissions of fact in the pleadings or in the examination of any other party, for such order as he may be entitled to; or where the only evidence consists of documents and such affidavits as are necessary to verify them; or where infants are concerned and



evidence is necessary, so far as they are concerned for the purpose of proving facts which are not disputed, O. XXXVI., r. 8.

11. Any application before the Court may be turned into a motion for judgment (O. XXXVI., r. 9).

12. At any time after the service of the writ an *ex parte* application may be made for leave forthwith to serve notice of motion for judgment. If leave be given, the Court may on return of the notice either grant or refuse the motion, or give directions for the examination of either parties or witnesses or the making of further inquiries, O. XXXVI., r. 10.

13. Cases formerly within the jurisdiction of the courts of law, if they escape premature extinction under one of the foregoing provisions, are to be tried as formerly they would have been, Ont. Jud. Act, s. 45.

14. Cases formerly within the exclusive jurisdiction of the Court of Chancery are to be tried according to the Chancery practice, *Ibid.*

#### JUDGMENT.

The Judge at the trial may direct judgment to be entered (O. XXXI., r. 21). In other cases a motion for judgment must be made to the Court (O. XXXVI., r. 1), when judgment may be ordered to be entered, or the Court may direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit. Judgment may either take the Chancery form of a decree or of an order to enter judgment as at Common Law. (*See notes to O. XXXVII., r. 1.*)

#### PRACTICE.

In enacting a new procedure the Legislature has no doubt endeavoured to adopt that which, in the conflict between the former practices, seemed to be the better; and the Courts have decided that where no provision is made by the Act or Rules "that practice, which appears, upon consideration, to be best, ought to prevail" (p. 28). The general course of the English authorities has been to assimilate the Common Law

to the Chancery practice (p. 27). The controversy with reference to the respective merits of the Chancery and Common Law methods of applying for orders has been compromised, by providing that in chambers at Toronto motions are to be upon notice (O. XLVIII., r. 1), and elsewhere upon summons (O. XLIX., r. 11); in Court in moving for a new trial, where the action has been tried before a jury a rule *nisi* must be obtained (O. XXXV., r. 1); but other motions are to be upon notice (O. XLVII., r. 1).

## COSTS.

All the Statutes with reference to costs following the verdict, obtaining certificates from the Judge, etc., are superseded (*See* p. 376). By O. L., r. 1, costs of, and incident to, all proceedings are to be in the discretion of the Court. Where the action is tried by a jury the costs are to follow the event, unless upon application made at the trial, for good cause shewn the Judge before whom the action is tried, or unless the Court, upon a subsequent application, in its discretion, otherwise order. The rights of trustees, mortgagees or other persons to costs out of a particular estate or fund to which they would be entitled according to the present rules of the Court of Chancery are expressly reserved.

## FORMS.

In the preparation of so extensive an Act it would be almost impossible completely to exclude errors, and while these appear throughout the Statute, they occur with most frequency among the forms. Although the forms are directly sanctioned by the Legislature (*see* O. LIX.), the adoption of the errors may lead to difficulty and embarrassment. Form No. 32 is of an affidavit of service of a writ of summons, but does not comply with O. VI., r. 12 (*a*). In some of the forms of statements of claim (Nos. 45, 50, 61, 64, 68) allegations are given, which are to be introduced by amendment to meet some defence set up in the statement of defence. This is wrong. Such matter must be raised in the reply and not by amendment as formerly in Chancery. In the forms of statements of defence (*see* Nos. 55,



57, 60, 73) all allegations which the defendant does not wish to admit are specifically denied. This is necessary in England, but not under the Ontario Act (see *supra* under heading *Pleadings*). The forms of Reply (Nos. 63 and 66) are tinged with the Chancery method of reply. They commence, "The defendant pretends," etc., and "The defendant alleges," etc. It is as improper that the plaintiff should in this manner reiterate the defence as it would be for the defendant to restate the claim filed by the plaintiff. Among the forms of indorsement upon writs of summons (No. 9) are those of two claims to administer an estate—one by a creditor, the other by a legatee—and forms Nos. 39 and 41 are statements of claim to be filed in similar actions. It must be remembered, however, that in simple cases the proper form of commencing administration proceedings is not with the assistance of these forms, but by a notice of motion under the former Chancery practice. Form No. 11 is of a notice of motion returnable in Chambers, and among the various orders, notice of moving for which is given, are:—(1) an order for discovery of documents which may be obtained upon *præcipe* (O. XXVII., r. 4), and (2) an order for examination of a judgment debtor as to means, no order at all being necessary (O. XLI., r. 1). Forms (Nos. 125, 138) are also given of orders made in Chambers for these purposes. Form 110 is of an order giving leave to issue a writ for service out of the jurisdiction, but O. VII., r. 4, provides that no such order shall be necessary.

#### THE PRESENT WORK.

In the compilation of the present work there were two courses open to the authors: to content themselves with merely noting any cases which appeared to bear upon the text, or to make some endeavour to elucidate the new, by references to the old, practice; to compare the Ontario with the English Act and Rules; and to suggest the solution of difficulties which appeared to exist. After as careful a study of the whole subject as limited time, and pressure of other engagements would permit, the authors determined to adopt the latter course. They are apprehensive that some, perhaps many, of the suggestions may

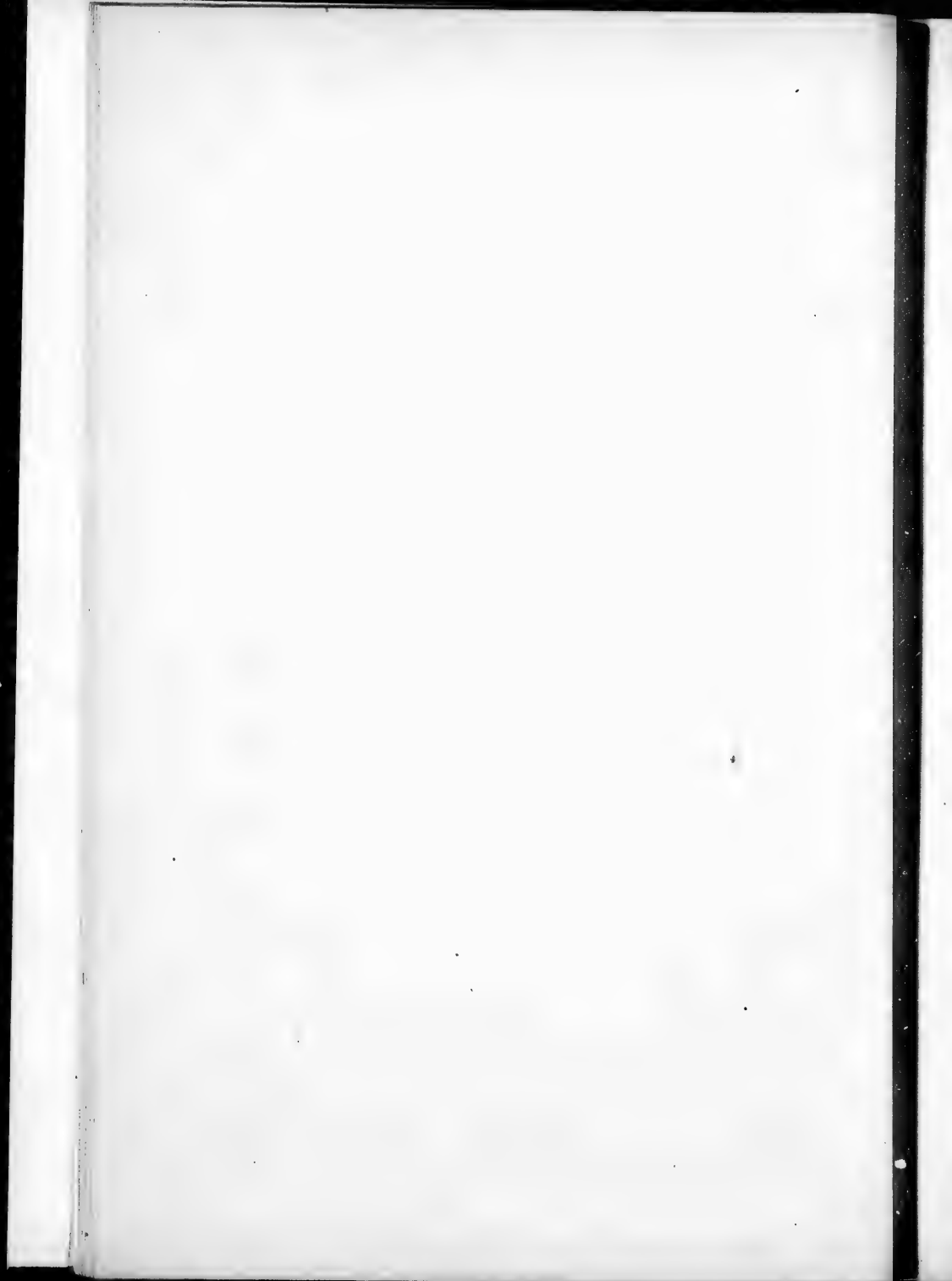
prove to be erroneous, but they feel confident that having put forth their best efforts for the assistance of the profession, they may safely depend upon its indulgence in respect of errors in a work so large and so surrounded by difficulty.

The authors, moreover, are well assured that whatever may be the merits of those portions of the work performed by themselves, there will still be found in its pages much that will be of the greatest value to members of the profession. The annotations to the English Trustee Acts and the later Chancery Orders are from the pen of Mr. G. S. Holmsted, Registrar of the Court of Chancery; those to the Ontario Trustee Act have been supplied by Mr. W. H. McClive, of St. Catharines; the admirable summary of the practice in mortgage suits has to be credited to Mr. N. W. Hoyles, and the practical notes upon an administration suit to Mr. T. S. Plumb. Interspersed with these latter are references to changes effected by the Judicature Act, for which the authors are alone responsible. This preface would be incomplete without an expression on the part of the authors of their thanks to these gentlemen for the arduous work which they have so kindly undertaken, and so ably performed; and also to Mr. Alex. Stuart and Mr. J. Y. Cruikshank, students-at-law, for their exceedingly patient and painstaking assistance in the compilation of the whole work.

T. W. T.

J. S. E.

TORONTO, *1st June, 1881.*



# TABLE OF CONTENTS.

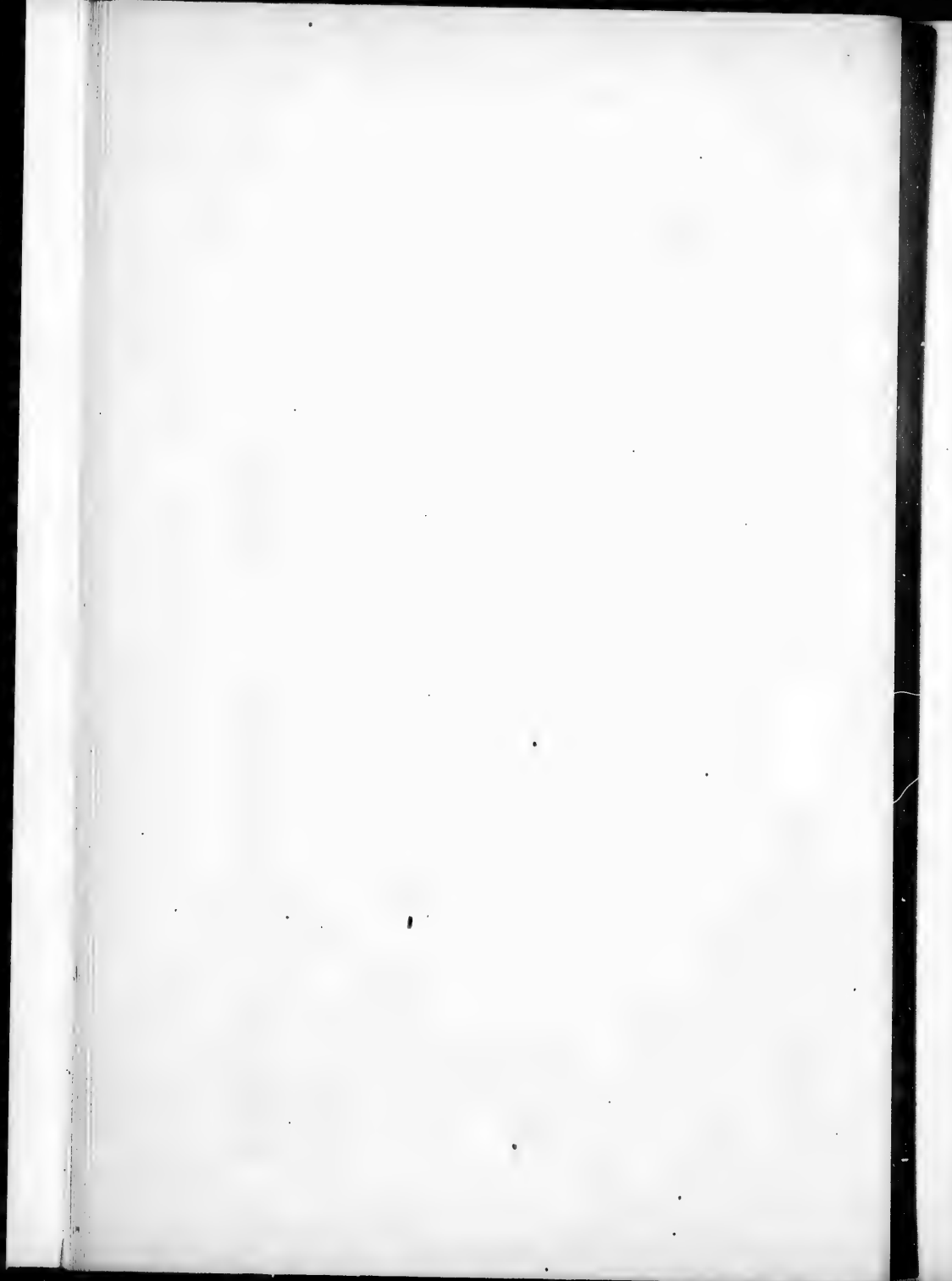
	PAGE.
Table shewing the sources from which the Judicature Act and Rules have been compiled .....	1-18
Judicature Act .....	19-124
Constitution of Supreme Court .....	19-23
Jurisdiction of High Court .....	23-28
"        Court of Appeal .....	28-30
Rules of Law declared upon certain points .....	30-62
Sittings and Distribution of business .....	63-69
Appeals .....	69-87
Trial and Procedure .....	87-99
Rules of Court .....	99-103
Officers and Offices .....	103-115
Solicitors .....	115
County Courts and Judges .....	116-119
Miscellaneous Provisions .....	119-121
Repeal .....	122
Interpretation .....	122-124
Rules of Court .....	125-405
Form and Commencement of Action .....	125-126
Writ of Summons and Procedure .....	127-129
Indorsements of Claim .....	129-139
Disclosure by Solicitors and Plaintiffs .....	139-144
Renewal of Writ .....	144-146
Service of Writ .....	146-155
"        out of Ontario .....	155-161
Appearance .....	162-168
Default of Appearance .....	168-174
Leave to Sign Judgment .....	174-178
Application for Account .....	178-179
Parties .....	180-212
Joinder of Causes of Action .....	212-216
Lunatics, &c. ....	216-217
Pleading generally .....	217-230
"        Matters arising, pending the Action .....	230-233
Statement of Claim .....	233-236
Defence .....	236-240
Discontinuance .....	240-243

	PAGE.
Reply and Subsequent Pleadings.....	243-244
Close of Pleadings.....	244-245
Issues.....	245
Amendment of Pleadings.....	246-255
Demurrer.....	255-264
Default of Pleading.....	264-269
Payment into Court in Satisfaction.....	270-272
Discovery and Inspection.....	272-289
Admissions.....	289-292
Inquiries and Account.....	292-294
Questions of Law.....	294-297
Trial.....	297-309
Evidence generally....	310-312
Commissions to Examine Witnesses.....	312-317
Evidence by Affidavit.....	317-320
Motion for New Trial in Jury Cases.....	321-323
Motion for Judgment....	324-329
Entry of Judgment....	329-334
Execution.....	334-343
Writs of Fieri Facias.....	344
Attachment of the Person.....	345-346
"    Debts.....	346-354
Writ of Possession.....	354
"    Delivery (Chattels)....	355
Change of Parties by Death, &c.....	355-360
Transfers and Consolidation.....	360-361
Interlocutory Orders as to Mandamus, &c., &c.....	362-365
Motions and other Applications.....	365-367
Applications at Chambers.....	368
Officers and Offices.....	369-376
Costs.....	376-391
Notices and Paper, &c.....	392
Time.....	392-395
Affidavits.....	396-397
Divisional and other Courts.....	398
Effect of Non-compliance and Errors.....	398-399
Accountant's Office.....	399-400
Sittings and Vacation.....	400-402
Exceptions from the Rules.....	402
Forms.....	402
County Courts.....	403
Interpretation.....	404
Pending Business.....	404-405
Forms.....	[1]-[95]
Writs of Summons, &c.....	[1]-[3]
Indorsements on Writs.....	[3]-[12]

# TABLE OF CONTENTS.

xv.

PAGE.		PAGE.
243-244	Notices .....	[13]-[23]
244-245	Affidavits... ..	[23]-[26]
245	Pleadings.....	[26]-[48]
246-255	Præcipes.....	[49]-[56]
255-264	Subpœnas, Commissions, &c .....	[56]-[60]
264-269	Certiorari and Prohibition.....	[60]-[62]
270-272	Orders.....	[62]-[79]
272-289	Judgments.....	[79]-[90]
289-292	Writs of Execution.....	[90]-[95]
292-294	Act respecting the Court of Chancery.....	[99]-[123]
294-297	"    Attorneys-at-Law.....	[124]-[135]
297-309	Act for better securing Trust Funds and for the Relief of Trustees.....	[136]-[142]
310-312	Act for the further Relief of Trustees.....	[143]-[144]
312-317	Act to Consolidate and Amend the Laws relating to the Conveyance	
317-320	and Transfer of Real and Personal Property vested in Mort-	
321-323	gagees and Trustees.....	[145]-[172]
324-329	Act to extend the provisions of the "Trustee Act, 1850.".....	[173]-[176]
329-334	Act respecting Trustees and Executors and the Administration of	
334-343	Estates.....	[177]-[180]
344	General Orders of the Court of Chancery.....	[181]-[266]
345-346		
346-354		
354		
355		
355-360		
360-361		
362-365		
365-367		
368		
369-376		
376-391		
392		
392-395		
396-397		
398		
398-399		
399-400		
400-402		
402		
402		
403		
404		
404-405		
[1]-[95]		
[1]-[3]		
[3]-[12]		



# TABLE OF CASES.

NOTE.—The numbers in brackets refer to the latter portion of the book.

	PAGE.		PAGE.
— v. —	[139]	Anderson v. Towgood	361
— v. Corcoran	148	Anderton v. Yates	318
— v. Jolland	[197]	Andrews, Re	59, [130], [134]
A. & B., Re	381, [130], [133]	“ v. Bohannon	330
Abbott, Re	[126], [135]	“ Lockwood	[123]
“ v. Parfit	215	“ Salt	59, 60
“ The Canada Central Ry. Co	260	Angel v. Smith	[198]
Abell v. Hiltz	275	Angell v. Haddon	[186], [246]
“ Weir	[106], [254], [260]	Angelo, Re	[148], [161]
Aberaman Iron Works v. Wickens	204	Anglo-Egyptian Naviga'n Co., Re	162
Abernethy v. Patton	237	Anglo-Italian Bank v. Davies	57, 343
Abud v. Riches	346	“ Wells	176
Acaster v. Anderson	[238]	Annis v. Wilson	[215]
Accidental Marine Assurance Co. v. Mercati	380	Anon	283, 288, 350, [178], [199], [214]
Adams Re, Adams v. Muirhead	[241]	Archibald v. Hunter	248
“ v. Eamer	[214]	Ardagh v. Orchard	[215]
“ Loomis	194	“ Wilson	[214]
Adamson, Re	[127]	Armitstead v. Durham	254
Ainleyville Congrega'n v. Grewci	202	Armour v. Robertson	156
Ainslie v. Sims	378	“ Osborne	[223]
Ainsworth v. Alman	205, [119]	Armston, Re	[141]
Aitkin v. Dunbar	41	Armstrong, Re	[113], [157], [185]
Alcock, Re	[134]	“ v. Montgomery	[121]
Aldwell v. Aldwell	[204], [236]	Arnold v. Arnold	231, 244, 252
Alforth v. Espinach	356	Arnott, Re, Chatterton v. Chatterton	140, [254]
Allan v. Allan	[165]	Arrowsmith, Re	[126], [149]
“ Houlden	184, 258	Arthur v. Brown	381
“ Kennedy	[264]	Ashley v. Taylor	247, 248, 276, 356
“ Pyper	148	Ashworth v. Outram	72
Allen, Re	62, 141, [139], [141]	Asiatic Banking Co. v. Anderson	148
“ v. Kennett	215	Askew v. Peddle	[185]
“ Lloyd	58	“ N. E. Ry. Co.	222, 250
“ Taylor	318	Aslatt v. Corporation of Southampton	56
Allhusen v. Labouchere	276	Associated Home Co. v. Whichcord	208
Ambroise v. Evelyn	237, 298	Aston v. Hurwitz	131
Ambrose Lake Tin and Copper Co.	78	Atkinson v. Pilgrim, Re	219
Amer v. Rodgers	197	“ Mackreth	184
Ames v. Birkenhead Dock Trustees	[199]	Atkins v. Cooke	381
Amos v. Chadwick	361	Atkins' estate, In re	355
Anderson v. Anderson	312	Atkinson, Re	[127]
“ Bank of British Columbia	279	“ v. Pegley	[127]
“ Dougall	[179]	Attorney-General v. Alford	[139], [141]
“ Pignet	49	“ Cambridge	246
“ Stather	396	“ Clapham	279
“ Titmas	321	“ Corporation of Avon	248



	PAGE.		PAGE.
Attorney-General v. Corporation of Leicester.	187	Bank of Whitehaven v. Thompson	149
" Draper's Co.	391	Banks v. Cartwright	[188]
" East Durham		Barber, Re	[142]
" Corn Ex. Co.	280	" v. Barber	258
" Ettough	296	" Mackerell	292
" Halling	[100]	Bardell v. Miller	134
" Marsh	251	Bardin's Will, Re	[118]
" Mercer's Co.	280	Bardwell v. Sheffield Waterworks Co.	295
" Murdock	[171]	Barehead v. Hall	339
" Nethercoat	251	Barker v. Eccles	49
" Panther	217	" Peile	[139]
" Parkhurst	217	" Walters	193
" Pearson	187	Barker's Estate, Re, Hetherington v. Longrigg	327
" Shrewsbury		Barnaby v. Tassels	297
" Bridge Co.	125	Barnes, Re	318, [163]
" Tomline	70	" v. Taylor	26
" Toronto St. Rail. Co.	125	" Twedell	136
" Tyler	217	Barnett v. Craw	141
" Walker	121	Barnley, Ex parte	[108], [109]
" Ward	[162]	Barnwell v. Ironmonger	[240]
" W. olwich	217	Barraclough v. Greenhaugh	291
" Wyville	162	Barrington, Re	[178]
Atwood v. Chichester	195, 269	Barrow, Re	[133], [134]
" Miller	42	Barry, Re	[112]
Atwood v. Merryweather	197	" v. Barry	[241], [260], [261], [262]
Augustinus v. Nerincks	236	" Brazil	[247], [261]
Ayles v. Cox	[170]	Bartholomew v. Freeman	362
Axford, Re	[117]	" Rawlings	42
B. & S., Re	[130]	Bartlam v. Yates	405
Babcock, Re	[238], [239]	Bartlett, Re	62
Bacon, Re	[128], [135]	" v. Bartlett	361, [168]
" v. Campbell	273	" Wood	[240]
Badcock, Re	[148], [151], [164]	Bartley v. Bartley	279
Bagot v. Easton	37, 214, 221, 238	Barton, Ex parte	[135]
Bagshawe, Re	[129]	" v. Barton	202
* Bailey, Re	[126], [139]	Bartrum, Re	[128]
" v. Bleecker	73	Barwick v. Barwick	150, 214
" Collett	295, [119]	Basnet v. Moxom	[161]
Bailey's Settlement, Re	250, 311	Bateman v. Cook	201, [259]
Bain v. McCarthy	51	" Margerison	187
Bainbrigg v. Baddeley	251, 254	Bates v. Master of Christ's College	281
Baines v. Bromeley	42	Bath's Case	71
Baker v. Oakes	377, 395	Bathurst, Re	[163]
" Trainor	186	Battell, Re	[140], [142]
" Wood	56	Battersby, Re	164
Bald v. Thompson	[178], [179]	Baughain, Ex parte	140
Baldwin v. Crawford	[199]	Bauman v. Mathews	101
Ball v. Cowdley	394	Baxter, Re	157
" The Grand Trunk Ry. Co.	73	Baxter v. Finlay	[200], [233]
Ballard v. White	[194]	Bayley, Re	[129], [134], [135]
Bank of British North America v. Heaton	[198]	" v. Cass	282
Bank of British North America v. Laughbrey	349	" Miles	295
Bank of Montreal v. Cameron	175	Beals v. Spencer	190
" Fox	[205], [236], [237]	Beall v. Smith	25, [108]
" Harrison	132	Beamish v. Pomeroy	357
" Ketchum	[219], [237]	Beard v. Gray	301
" Ryan	[196]	Beardsall v. Chatham	361
Bank of Toronto v. Burton	350	Beaty v. Curson	[139], [141], [142]
" Upper Canada v. Rutlan	202, 243	" Radenhurst	[203], [234]
" Wallace	[267]	Bean v. Griffith	402
		Beaucherk, Re	[138], [140]
		Beavan v. Burgess	190
		Becher v. Webb	228
		Becke, Re	[133]

## TABLE OF CASES.

xix.

PAGE.		PAGE.		PAGE.
149	Heddall v. Maitland.....	40, 42	Blackburn Union v. Brooks.....	311
[188]	Beddington v. Beddington .....	128, 139	Blaggrave v. Routh .....	[129]
[142]	Beddow v. Beddow .....	56	Blain, Ex parte .....	199
258	Beecher, Barker & Street, Re .....	[127]	" v. Terryberry .....	[240]
292	Beeching v. Lloyd .....	202	Blake, Re .....	[124]
134	Befford, Re .....	[140]	" v. Albion .....	222, 250
[118]	Beg v. Cooper .....	176	" Appleyard .....	41, 219
295	Belcher v. Magnay .....	30	" Kirkpatrick .....	[264]
339	Bell, Re, Bell v. Bell .....	[239]	Blakesley, Re .....	[130]
49	" v. Cade .....	295, [119], [120]	Blakeney v. Dufaur .....	379
[139]	" Chamberlain .....	283	Blanchard, Re .....	[162]
198	" Hornby .....	304	Blanchenay v. Burt .....	342
327	" The London and North-		Blandy v. DeBurgh .....	[126]
297	Western Ry. Co .....	51	Blasdell v. Baldwin .....	[254]
[318, [163]	" Wilkinson .....	27, 263	Blaylock v. McFarlane .....	[195], [255]
26	Belshan v. Purcival .....	357	Bleecker v. Campbell .....	172
136	Bendyshe, Re .....	[119]	Blevins v. Madden .....	353
141	Bencke v. Frost .....	206, 209	Blewitt v. Dowling .....	46
[108], [109]	Bennett, Re .....	[134]	Blong v. Kennedy .....	[215], [230]
[240]	" v. Baxter .....	182	Bloomar, Re .....	[150]
291	" Bennett .....	380, [106]	Bloomfield v. Brooke .....	161, 345, [281]
[133], [134]	" Moore .....	328	Bloye, Re .....	[141], [142]
[261], [262]	" O'Meara .....	136	Blunt v. Heslopp .....	[126]
[247], [261]	" Tregent .....	140	Blyth & Young, Re .....	77
362	Benson v. Hadfield .....	258	Boddy, Re .....	[116]
42	" Paull .....	55	Boden, Re .....	[155]
405	Bentley v. Berry .....	141	Boice v. O'Loane .....	380
62	Benton v. Polkingham .....	241	Bolingbroke v. Kerr .....	215
[361, [168]	Benyon v. Godden .....	210	Bolkow v. Foster .....	274
[240]	Berdan v. Greenwood .....	250, 270	Bolton, Re .....	[141]
279	Berkley, Re .....	[163], [179]	" v. Bolton .....	312, 335
[135]	Bernard v. Alley .....	[196], [231]	" Corporation of Liverpool .....	281
202	" Jarvis .....	[107]	" Standard .....	187
[128]	Berney v. Sewell .....	57	Bones v. Angier .....	148
[150, 214]	Berridge v. Roberts .....	176	Boomer, Re .....	[128], [132]
[201, 259]	Berry v. Andrews .....	[126]	Booth v. Briscoe .....	180, 183
187	" The Exchange Trading Co. ....	365	Boschetti v. Power .....	291
College 281	Bertie v. Lord Abingdon .....	[199]	Boucicault v. Delafield .....	357
71	Bertolacci v. Johnson .....	[184]	Boughton, Re .....	[119]
[140]	Betagh v. Concannon .....	[123]	Boultes, Re .....	[127], [129]
163	Bescoby v. Hamilton Water Com-		" v. Cameron .....	237, 259
142	missioners .....	350	Boulton, Re .....	[140]
164	Bethell v. Casson .....	280	" v. Boulton .....	241
140	Betts v. Cleaver .....	391	" The Church Society .....	22
101	" Menzies .....	283	Bounardet v. Taylor .....	284
157	" Thompson .....	202	Bourke, Re .....	[165]
[200], [233]	Bevan, Re .....	[128], [132]	Boustead v. Whitmore .....	193
[134], [135]	Berwicke v. Graham .....	280, 281	Bovill v. Cowan .....	282
282	Biehn v. Biehn .....	[107]	Bowell v. Bell; Brooks v. Israel;	
295	Biggar v. Dickson .....	180, [179]	North v. Bilton; Siddons v.	
190	" Way .....	231	Lawrence .....	377
[25, [108]	Biggs, Re .....	[138]	Bowen, Re .....	[132]
357	" v. Penn. ....	*184	" v. Fox .....	[122], [237]
301	Bigold, Re .....	[127], [134], [162]	" Pearson .....	283
361	Bigaby v. Dickinson .....	[319]	Bower v. Cooper .....	253
[141], [142]	Bilton v. Blakely .....	56	" Hartley .....	209
[203], [234]	Birch, Re .....	[141]	Bowker v. Nickson .....	[194]
402	" v. Cropper .....	[163]	Bowman v. Bowman .....	349
[138], [140]	" Williams .....	304	Bowra v. Wright .....	[160]
190	Bird, Re .....	[141]	Bowlaugh v. Bowlaugh .....	307, 104
228	Birkett, Re .....	[141], [142]	Boyer v. Beamish .....	123
[133]	Birmingham Estates Co. v. Smith .....	37, 40	Box, Re .....	178
	Bishop v. Willis .....	251	Boycott, Re .....	[163]
	Bishop of Winchester v. Bowker .....	281	Boyd v. Haines .....	349, 350
	Bissett v. Strachan .....	241	" Wilson .....	[210], [223]
	Blackburn v. Sheriff .....	[204], [231], [235]	Boyle, Re .....	[134]

	PAGE.		PAGE.
Boyle v. Bettws Llantwit Co	57	Buckton v. Higgs	376
Boynnton v. Boynnton	356	Budding v. Murdock	246, 251
Bracey, Re	127	Buell v. Fisher	[207], [224]
Brackenbury, Re	[170], [171]	" Whitney	132
Bradlaugh v. The Queen	224	Buenos Ayres and Euseñada Port Railway Company v. The North- ern Railway Company of Buenos Ayres	157
Bradley v. Bradley	[104]	Bugden v. South	281
" Munton	[170]	Building and Loan Association v. Carswell	[220]
Bradshaw, Ex parte	156	Bulkely v. Earl of Eglington [163],	[171]
Brady, Re	[135]	Bulkeley v. Hope	295
Brandon, Re	[141]	Bull v. Harper	[200], [236], [237]
" v. Beasley, Re	62	Bullock v. Corry	280
Brandreth's Trade Mark, Re	376	Bulnois v. McKenzie	235
Brasheur v. The Secretary of the Navy	54	Bunn v. Bunn	283
Brass, Re	[156]	Buntin v. Georgan	51
Brentnall, Re	[163]	Burbridge v. Robinson	282
Brett v. Smith	128	Burchell v. Giles	219, 253
Brewen v. Austin	[214]	Burgoine v. Taylor	79, 305
Bridgewater v. DeWinton	283	Burke v. Ryne	[209]
Bridgeman, Re	[162]	" Rooney	265, 395
Brigham v. Smith	75	Burnham v. Jones	154
Brignall v. Whitehead	359	Burt, Re	[148], [161], [171]
Brillinger, Re	[112], [262]	Burton, Re	[112]
Bristow v. Needham	[199]	" v. Roberts	347
British American Assurance Co. v. Wilkinson	282	Bush, Re	[126]
Broadwood, Re	[144]	" v. Beavan	55
Brook v. Saul	[203]	" Sayer	[127]
Brocklesby, Re	[141]	" Trowbridge Waterworks Co.	258, 259
Broder v. Saillard	309	Bustros v. Bustros	28, 128, 159
Brodie v. Barry	56, [111]	" White	28, 62, 135, 279
Bromley, Re	[241], [260]	Butler v. Butler	37, 238
" v. Williams	197, [257]	" Church	79
Brook v. Brook	[163]	" Knight	71
Brooke v. Wigg	310	Byam v. Byam	[164]
Brothers v. Lloyd	[214]	Byers v. Woodburn	[195]
Brotherton v. Hetherington	[227]	Byng v. Clark	236
Broughton v. Lashmere	242	Byrch, Re	[127]
Brown, Re	295, [119], [129]	Byrd v. Nunn	226
" v. Bamford	141	Byrne, Re	[162]
" Bemiger	347	Caddick's Settled Estates, Re	[119]
" Capron	280, 282	Cade v. Newhall	[195], [264]
" Johnson	339	Caisse v. Burnham	79
" Lake	[187]	" Tharp	350
" Lee	236	Caldwell, Re	[178]
" Merrills	349	" v. Pagharn Harbour Re- clamation Co.	247
" Perry	[199]	" The Merchants' Bank.	51
" Perkins	282	Callander v. Hawkins	233, 272
" Sewell	284	Callicott, Re	[117]
" Shaw	379	Calvert v. Linley	257
" Smith	303	Cambottie v. Inngate	379
Browne, Re	[134]	Cameron, Re	[129], [135]
Browning v. Sabin	346	" v. Baker	148
Bryan v. Cormick	[199]	" Bethune	[179], [180]
Bryant, Re	335, [144]	" Brantford Gas Co	348
" v. Bull	58	" Cameron	[232]
Bryson v. Huntington	[228]	" Campbell	[134]
Bubb v. Yelverton	48	" Coalbrooke Ry. Co.	281, 282
Buchan v. Wilks	[200]	" Re	357
Buchanan v. Betts	167	" Eager	357
" Frank	339	" McCrae	[218], [222]
Buck, Re	[237]		
" v. Evans	39		
Buckton v. Higgs	272		
Buckley, Re	[135]		
" v. Oulette	[237]		

## TABLE OF CASES.

xxi.

PAGE.		PAGE.		PAGE.
376	Cameron v. McDonald, Re Mc-	261	Central African Trading Co. v.	36
246, 251	Donald	228	Grove	346
[207], [224]	" Wolf Island	163	Challen v. Baker	[192]
132	Campbell, Re [124], [127], [149]	239	Chalmers v. Laurie	[140]
a Port	" v. Bell	114	Chamberlain, Re	259
North-	" Campbell, 188, [104], [114]	130	" v. McDonald	121
Buenos	" [264]	380	Chambers, Re	126
157	" Garrett	233	" v. Unger	[125]
281	" Holyland	76, 79	Champ v. Stokes	[205]
tion v.	" McKay	304	Champion v. Forinby	283
[163], [171]	" Peden	73	Chandler, Re	248, 249
296	" Taylor	127	Chard v. Meyers	179
[236], [237]	" Tucker	306	Charles, Re	304
280	Canada Permanent Building So-	221	Charlton v. Allen	283
235	cietv v. Wallis	395	" Coombs	366
283	" Loan and Savings Co. v.	281	Chennell, Re	284, 289
51	Macdonnell	284	Chesterfield Co. v. Black	127
282	Canadian Oil Works v. Hay	247, 248, 249	Chilcote, Re	39, 181, 214, 221
219, 253	Cant, Ex parte	202	Child v. Stenning	327
79, 305	Capes v. Brewer	353	Chilton v. Corporation of London	237
[209]	Capeleus v. Brown	104	Chisholm v. Allen	179
205, 395	Carden, Re	359	" Barnard	143, 306
154	Carew, Re	124	" Sheldon	298, 304, 356
[161], [171]	" v. White	107	Chorlton v. Dickie	250
[112]	Cargill v. Bower	218	Christie v. Christie	257
347	Carlisle v. South-Eastern Ry. Co.	227	" Dowker	[221], [257]
[126]	Carney v. Bolton	60, 61, 62	" Ovington	[150], [151], [153]
55	Carr v. Baycroft	202	Church v. Marsh	366
[127]	" Carr	202	Churton v. Frewen	281, 284
works	" Moffat	170	City Bank v. Scatterd	[239], 262
258, 259	Carroll, Re	265	City of Moscow Gas Co. v. Inter-	
28, 128, 159	" v. Carroll	60	national Finance Co.	390
62, 135, 279	" Hopkins	208	Clark, Re	[112], [117], [118], [130], [240]
37, 238	" Robertson	166	" Cumberland v. Clark	[255]
79	Carswell, Re	107	" v. Baker	162
71	Carter v. James	187	" Callow	226
[164]	" Sanders	130	" Clarke 337, 352, 353, 379, [101],	[192], [255]
[195]	" Sebright	288	Clarke v. Crawthorne	141
236	" Stubbs	136	" Ferguson	379
[127]	Cartlidge v. Cartledge	291	" Perry	352
[127]	Cargo, The, ex " Serpedon"	55	" Tyne Improvement Com-	
226	Carpenter, Re [148], [151], [161]	185	missioners	381
[162]	Cartwright v. Diehl	349	Clarkson v. Parker	[127]
	" Ross	141	Claxton v. Gilbert	51
e [119]	Carven, Re	130	Clay, Re	[164]
[195], [264]	Carver v. Piritto Leite	226, 257, 258	Clayton v. Clarke	189
79	Carvick v. Young	167, [223]	Clegg v. Edmondson	280, 281
350	Cary v. Cumberland	101	Foshwick	56
[178]	" Yarmouth and Norwich	138, [142]	Clement v. Bowes	201
ar Re	Ry. Co	234, [234]	Cleveland v. McDonald	307
247	Casey, Re	140	Cliff v. Wilkinson	382
Bank. 51	" v. Arnott	361	Clinch v. Financial Corporation	282
233, 272	Cashin v. Cradock		Clowes v. Hilliard	201
[117]	Cast v. Poyser		Clutton, Ex parte	[163]
257	Castro v. Murray		Coates v. Lloyd	51
379	Casy v. McGrath		Cobbe, Re	141
[129], [135]	Cataraqui Road Co. v. Dunn		Cobourg Town Trust, Re The	[178]
148	Cater, Re		Cochenour v. Bullock	[206], [216]
[179], [180]	Catlin, Re		Cockburn v. Gillespie	184
348	Catling v. King		Cockell v. Pugh	[158]
[232]	Cattanach v. Urquhart		Cockle v. Joyce	304, 305
[134]	Catton v. Wyld		Codwell v. Neale	[127]
Co.	Cawthorne, Re		Coe, Re	[139]
281, 282	Cayley v. Colbert		Coffin v. Cooper	250
357	Cazneau, Re		Cogswell v. Sugden	51
[218], [222]	Ceciv v. Briggs			

	PAGE.		PAGE.
Cohen v. Hale .....	349	Coppard v. Allen .....	184
Colborne v. Thomas .....	313	Corbett v. Myers .....	345
Colby v. Hawkins .....	184	Corby v. Cotton .....	202, 247
Coldwell v. Hall .....	[185], [226]	Cormack v. Geofrian .....	202
Cole v. Bank of Montreal .....	51	Cornwall v. Brown .....	[228]
Colebourne v. Colebourne .....	55, 57, 129	Corporation of Huddersfield and	
Colebrooke, Ex parte .....	[100]	Jacomb, Re .....	97
v. Attorney-General .....	[100]	Corsellis v. Patman .....	[228]
" Jones .....	379	Cory v. Thames Iron Co. ....	[101]
Cole v. Frith .....	42	The Yarmouth and Nor-	
Glover .....	260, 261, [241]	wich Railway Co. ....	55
Coleman v. Mellerish .....	[188]	Conasey v. Ducklow .....	392
West Hartlepool Har-		" L. B. & S. Coast Railway	
bour Co. ....	284	Co. ....	281
Coles v. Sherwood .....	139	Cotterell, Re .....	[163]
Collard v. Roe .....	[167]	" v. Stratton .....	72, 74, [228]
Collette v. Goode .....	202, 228, 247	Cotton v. Houseman .....	235
Dickenson .....	197	Vansittart .....	349
Preston .....	231, 244, 252	Coulson, Re .....	[138]
Collie, Re .....	207	Counter v. Wyld .....	[215]
Collier v. Stutely .....	[201]	Coursey v. Humphrey .....	162
Collins v. The Vestry of Padding-		Court v. Holland .....	[183], [213], [225]
ton .....	75, 395	Cousens v. Cousens .....	391
Collinson v. Collinson .....	[61], [168], [171]	Coventry, Re .....	[141]
Lister .....	357	Covington, Re .....	[141]
Collver v. Swazie .....	140	Cowdell v. Neale .....	[126]
Colonial Trusts v. Cameron .....	305	Cox v. Barker .....	184, 257
Colquhoun, Re .....	[130]	" Barnard .....	185
Colson, Re .....	[140]	" Cox .....	[138]
Colyer, Re .....	[163]	Henderson .....	[102]
Colyer .....	282, [187], [192]	Stephens .....	184
Commander v. Gilrie .....	[170]	Cozens v. McDougal .....	[195], [264]
Commercial Bank v. Jarvis .....	350	Cracknall v. Janson .....	250
" Williams .....	350	Craig, Ex parte .....	[119]
Commissioners of Sewers of Lon-		" v. Dillon .....	133
don v. Gellatly .....	198	Phillips .....	77
Commissioners of Sewers of Lon-		Cramer v. Cramer .....	[157]
don v. Glass .....	276	Crane v. Jullion .....	148, 149
Commissioners of the Coubourg		Cranmer, Ex parte .....	[109]
Town Trust .....	[178]	Crause v. Cooper .....	140
Commonwealth v. The Commis-		Crawford and Crombie, Re .....	[130]
sioners of Alleghany County ..	54	" v. Birdsall .....	169
Conger v. McKechnie .....	290	" Boyd .....	[234]
Congreve, Re .....	391	Green v. Wright .....	377
Connelly v. Brenner .....	394	Cremetti v. Crown .....	342, 349
Connington v. Gilliat .....	301	Cresswell v. Parker .....	159
Consolidated Bank v. Bickford ..	339	Creswick v. Thompson [200], [203],	[235]
" Neilson .....	278	Creuze v. Hunter .....	182
Const v. Harris .....	56	Cridland v. Lord DeManley ..	254
Constable v. Howick .....	[215], [230]	Crippen v. Ogilvie .....	[226]
Conybeare, Ex parte .....	[163]	Crockett v. Bishton .....	396
" Lewis .....	241	Crom v. Samuels .....	376
Cook v. Bolton .....	[182]	Crompton v. Lee .....	32
" Day .....	148	Crone v. Crone .....	[213]
" Euchmarsh .....	215	Cronk v. Cronk .....	103
" Gillard .....	[126]	Crooks v. Crooks .....	[186], [203], [204], [235]
" Oceanic Steam Co. ....	27, 280	" Glen .....	[202], [203], [234]
Coolidge v. Bank of Montreal ..	334	" Street .....	[195], [204]
Coombs v. Coombs .....	[186]	Cropper v. Mellersh .....	187
Cooper, Re .....	[138]	Cross v. Cross .....	188
Blissett .....	198	Crowder v. Shee .....	[126]
" Brayne .....	353	Crowe, Re .....	[148], [151], [157], [158]
" Earl Powis .....	258	" .....	[161], [174]
" MacDonald .....	[162]	Crowe v. Barnicot .....	40, 219
" Furton .....	381	" Russell .....	46
" Whittingham .....	56	Croyden, Re .....	[141]

PAGE.		PAGE.		PAGE.
184	Cruikshank v. The Floating Swi-	97, 294,	309	Davy v. Garrett ..... 182, 222, 249, 250
345	ming Baths Co			Daw v. Eley ..... 281
202, 247	Crump v. Cavendish	176		Dawson v. Graham ..... 51
202	Cruso v. Close	[207], [227]		Dawkins v. Lord Penrhyn ..... 228, 258
[228]	Cuddick v. Cook	187		" Lord Rokeby ..... 45
97	Cuddon v. Tite	256		" Prince Edward of Saxe
[228]	Cull, Re	[141]		Weimar ..... 45, 145
[101]	Cullen v. Cullen	335		" Stephenson ..... 45
55	Culley v. Buttifant	268, 405		" Wynyard ..... 45
392	Culverhouse v. Wickens	352		Dawson, Re ..... (161), [162]
281	Cumberlege v. Carter	237		" v. Raynes ..... [199]
[163]	Cumner v. Tomlinson	[215], [230]		" Shepherd ..... 209
[228]	Cumming, Re	[109], [148], 161		Day v. Brown ..... [264]
235	Cummins v. Credit Valley	[228]		" Day ..... 295, [119]
349	" Harrison	[211]		" Vinson ..... 291
[138]	" Herrin	75		Dean v. Lamprey ..... 380, [121]
[215]	Cupples v. Yorton	148		" Wilson ..... [233]
162	Currie, Re	[134]		Dear v. Sworder ..... 38
[141]	Curriers' Co. v. Corbett	[101]		Dearden, Re ..... [135], [155]
391	Curtis v. Curtis	60, 62		Decatur v. The Secretary of the Navy
[141]	" McNabb	380		DeHart v. Stephenson ..... 198, 203
[141]	Cust v. Middleton	[148], [161]		De La Rue v. Dickenson ..... 281, 288
[128]	Cuthbert v. Commercial Travel-	351, 385		De La Touche, Re ..... [141]
184, 257	lers' Association			DeLisle v. McKaw ..... 187
185	" Wharmby	[186], [242]		Dempsey v. Winstanley ..... [128]
[138]	Dacosta v. Dacosta	188		Dennis, Re ..... [162], [163], [177]
[102]	Dagg v. Dagg	[179], [253]		" v. Seymour ..... 178
184	Dalby, Re	[127]		Denison v. Denison ..... [179], [253]
[195], [264]	Dale v. Hamilton	200		Densen v. Elworthy ..... 186
250	Dalglish, Re	[158], [163], 164		Dent v. Basham ..... [132]
[119]	Dalton, Re	[119]		" Sovereign Life Assurance Co
133	" v. Hayter	231, 244, 252		Denton v. Maitland ..... 353
77	Dalziel v. Grand Trunk Ry. Co.	278		Desborough v. Harris ..... [138]
[187]	Danford v. Cameron	148		Devaynes v. Robinson ..... 187
148, 149	Dangar v. Stewart	387		DeVisme, Re ..... [161]
[109]	Daniel, Re	[127]		Dew v. Clarke ..... 312
[140]	Darby v. Darby	295		Dewalt v. Hughitt ..... 274
[130]	Darby v. Whittaker	[101]		Dewar v. Maitland ..... [148]
169	Darling v. Darling	226, 315, 316		" Orr ..... 71
[234]	" Rice	195, 196		Dexter v. Cosford ..... [120]
377	" Wallace	166		Dick v. McNab ..... [205]
342, 349	Daubney v. Leake	[192]		Dicker v. Clarke ..... 148
159	" Shuttleworth	365, 367		Dickey v. Heron ..... [203]
[203], [235]	Davenport v. Rylands	[101]		" Heron ..... 234
[182]	" Stafford	330		Dickinson, Re ..... [148], [163]
254	Davidson v. Boomer	79		Dickson v. Cook ..... 337, 345
[228]	" Cameron	133		" Draper ..... 187
396	" Grange	339		" The Neath and Brecon Ry. Co
376	" Gray	42		Dilk v. Douglas ..... [150], [155]
32	" Hayes	[220]		Dimes v. Grand Junction Canal Company
[213]	Davis, Re	[135]		" Wright ..... 22
103	" v. Angell	[170], [171], [178]		Dingman v. Austin ..... 194
[3], [204], 235	" Cracraft	[165]		Dix v. Groom ..... 75, 266
[2], [203], 234	" Felix	[199]		Dixon, Re ..... [158]
[195], [204]	" Garland	321		" v. Evans ..... 71
187	Davis, Re 62, 327, [112], [148], [162], [164]	145		" Pyner ..... [200]
188	" Chanter	[162]		Dobson v. Dobson ..... 277
[126]	" v. Combermere	[183]		Dodge v. Clapp ..... [256], [264], [266]
[157], 158	" Davis	71		Dodkin v. Brunt ..... 164
[161], 174	" Earl of Dysart	[130]		Doe & Fraser v. Eaglesum ..... [129]
40, 219	" McCaffrey	62		" v. Martin ..... 30
46	" Spence	175		" Read ..... [199]
[141]	Davy, Re	[128], [130]		Dolman, Re ..... [127]
	" v. Davy	251		

	PAGE.		PAGE.
Domville v. Lamb .....	295, [119]	Edward v. Lowther .....	182, 202
Doody v. Higgins .....	187	Edwards, Re .....	[141]
Dornyn v. Fralick .....	[218]	"    v. Burke .....	379
Douglass v. Archbutt .....	318	"    Burling .....	[209]
Doune v. Hart .....	195	"    Edwards .....	58, [103]
Doupe v. Stewart .....	56	"    Lawless .....	126
Dow v. Dickinson .....	320	"    Millbank .....	295, [120]
Downey v. Roaf .....	378	Edwin Owen & The London and	
Doyle v. Anderson .....	361	North-Western Ry. Co., Re .....	391
"    Douglas .....	361	Eggington v. Cumberlege .....	[126]
"    Kaufman .....	145, 395	Egremont Burial Board v. Egre-	
Drake, Re .....	[134]	mont Iron Ore Co .....	283
"    v. Symes .....	202	Ekat v. McCall .....	346
Draper, Re .....	[161], [164]	Elberton v. Thirak .....	365
"    v. Manchester Ry. Co .....	284	Eldridge v. Burgess .....	304, 335
Drew v. Clifford .....	[126]	Elgar, Re .....	[141]
Drewe, Re .....	[163]	Ellerthorpe, Re .....	[150]
Drewry v. O'Neil .....	[210], [223]	Elliott, Re .....	[141]
Drinan v. Mannix .....	381	"    v. Beard .....	149
Driver, Re .....	[162], [163]	"    Hunter .....	[213], [225]
Drummond v. Anderson .....	330	"    Jayne .....	49
Dryden v. Frost .....	396	"    Northern Assurance Co. .....	391
Duckett v. Grover .....	201, 264	"    Pinkerton .....	[121]
Dudley v. Berzy .....	[209]	Ellis, Re .....	[157], [158]
Duff v. Barrett .....	79	"    v. Desilva .....	378
Duffy v. Connor .....	161	"    Guitton .....	[119]
Duggan, Re .....	[113]	"    Munsen .....	39, 231
"    v. Cotton .....	[127]	Ellison, Re .....	[163], [164]
Duggan's Trusts, in Re .....	383	"    v. Ellison .....	143
Duke of Sutherland v. Tunstall		"    Thomas .....	[192]
Board .....	247	Elliston v. Robinson .....	133
Duncombe v. Lewis .....	244, 251	Ellwood v. Pierce .....	[235]
Dunkirk Colliery Co. v. Lever .....	95, 96, 309	Elmer v. Creasy .....	288
Dunlevy, Re .....	[241], [260]	Elmore, Re .....	178
Dunn v. Dowling .....	[107]	Elmslie, Re .....	[134]
"    McLean .....	204, 251	Elsey v. Adams .....	242
Dunt v. Dunt .....	[134]	Elton v. Larkins .....	291
Durell v. Pritchard .....	[101]	Elwon v. Vaughan .....	204
Durnard v. McCleod .....	79	Emery v. Webster .....	272
Dyce, Re .....	[111]	Emma Silver Mining Co. v.	
"    Kaufman .....	234	Grant .....	44, 299
Dymond v. Croft .....	155, 223, 268, 366	Emmett v. Clarke .....	[163]
Eade v. Jacobs .....	276	Emrich v. Sullivan .....	191
Eadie v. McEwen .....	334	Engleheart v. Moore .....	[126]
Earl of Tyrone v. Marquis of		English v. English .....	[191], [240], [256]
Waterford .....	295, [120]	"    Hayman .....	357
Early, Re .....	[114]	English and Scottish Inv. Co.	
"    v. McGill .....	312	"    v. Gray .....	[223]
Earp v. Henderson .....	221, 243, 244	Enthoven v. Cobb .....	283
East, Re .....	[166]	Erle v. Hunt .....	156
Eastman v. Eastman .....	134	Erskine, Re .....	[141]
Eastwood v. Lever .....	[101]	Erwin v. Powley .....	145
Eaton, Re, Byers v. Woodburn .....	195, [229], [255]	Escott v. Escott .....	269
Eberts v. Eberts .....	[238]	Ette, Re .....	[241], [260], [261], [262]
Ebres v. Ebres .....	297	European Banking Co., Re .....	162
Eccles, Re .....	[128]	Evans, Re .....	[117], [140], [142], [178]
"    v. Carroll, Re .....	[128]	"    v. Buck .....	39, 181
"    Johnson .....	[128]	"    Coventry .....	202
Eden v. Naish .....	46	"    Gunn .....	41
Edge v. Duke .....	251	"    Root .....	251
Edgson v. Edgson .....	149	"    Saunders .....	295, [119]
Edmonds v. Foley .....	282	Evelyn v. Chippendale .....	379
Edmunds v. Ackland .....	[182]	Everett v. Prythergh .....	250
"    The Attorney-General .....	46	Eyre, Re .....	[128]
		"    v. Hanson .....	[214]
		"    Hughes .....	37







	PAGE.		PAGE.
G. v. V. ....	214	Goodchap v. Weaving .....	282
Galbraith v. Armstrong .....	357	Goodday v. Sleigh .....	242
Gallagher v. Gairdner .....	275	Goode v. West .....	[139]
Galloway v. Corporation of London .....	[128]	Goodfellow, Re. ....	[119]
Galt v. Spencer .....	379	“ v. Rannie. ....	[262]
Gandee v. Stansfield .....	281	Goodman v. Whitcomb .....	56
Ganson v. Finch .....	379	Goodtitle v. Badtittle .....	342
Garbutt v. Fawcus .....	34, 45	Goodwin v. Goswell .....	[125]
Gardner, Re. ....	[151]	Goodwin's Settled Estates, Re. ....	[118]
“ v. Cowles. ....	[148], [174], [175]	Gordon v. Calvert .....	[199]
Gardiner v. Garret .....	[239]	“ Eakins .....	[226]
“ Irwin .....	280	“ Great Western Ry Co. 78, 79	
Garland, Ex parte. ....	54	“ Hanna .....	148
“ v. Garland .....	[197]	Gorham v. Gorham. ....	[256], [259], [265]
Garnet v. Bradley .....	377	Gossip v. Wright .....	246
Gartside, Re. ....	[162]	Gott v. Gott .....	[105]
Garty, Re. ....	[162], [163]	Gough v. Bage .....	[160], [167], [173]
Gaskin v. Ball .....	56	Gould v. Burritt .....	[179], [196]
Gates v. Buckland .....	391	“ Rich .....	79
“ Crooks .....	339	Gouthwaite v. Rippon .....	251
Gath v. Webster .....	179	Gover v. Street .....	39
Gaunt v. Taylor .....	162	Gracey v. Gracey .....	[103]
Gedye, Re. ....	[129]	Graham v. Campbell .....	72, 364
Gegg v. Taylor .....	[127]	“ Davis .....	357, [209]
Geldard v. Hornby .....	[214]	“ Robson. ....	[241], [253], [261]
Gemmell v. Burn .....	[222]	Grand Junction v. Bickford .....	[223]
Gibb v. Murphy .....	376	Grane v. Cooper .....	283
Gibbons v. London Financial Association .....	376, 395	Granger v. Latham .....	[205]
Gibbs v. Cruickshank .....	50	Grant, Re. ....	[170], [171]
“ David .....	363	“ v. Banque Franco, Egyptienne .....	313
Gibson v. Jeyes .....	[111]	“ Corporation of City of Hamilton .....	339
Giddings v. Giddings .....	382	“ Eddy .....	256, 257
Gidlestone v. Lavender .....	[206]	“ Grant .....	[163]
Gilbert v. Braithwaite .....	24	“ Holland, Ross v. Grant. ....	28, 62, 135
“ Endean .....	46	“ Winchester .....	379
“ Smith .....	328	Gray v. Lewis .....	184
Gildersleeve v. Cowan .....	259	Great Australian Gold Mining Co. v. Martin .....	159
“ McDougal .....	157	“ Northern Committee and Mett, Re. ....	378
Giles v. Benjamin .....	197	“ Western Colliery Company v. Tucker .....	288
Gillespie v. Alexander .....	[186]	Green, Re. ....	[178]
“ Shaw .....	339, [134]	“ v. Adams .....	[218], [222]
Gillett, Re. ....	[164]	“ Aimey .....	280
Gillot v. Ker .....	268	“ Charnock .....	379
Gilmour v. Meyers .....	[214], [232]	“ Sevin .....	41
Girdlestone v. Gunn .....	[216], [235]	Greene, Re. ....	[118]
Girvin v. Grepe .....	175	Greenhill .....	405
Gladstone v. Ottoman Bank .....	262	Greenhields v. Blackwood. ....	[215], [217]
Glass, Ex parte .....	[128], [133]	“ .....	230
“ v. Moore .....	[209]	Greenwood, Re. ....	133
“ Munsen .....	258, [260]	Greer, Re. ....	[161], [171]
Gledhill v. Hunter .....	214	Greet v. Citizen's Insurance Co. ....	51
Glegg v. Rees .....	187	Gregson, Re. ....	282
Glen v. Lewis .....	237	Greig v. Somerville .....	[186]
Glenham v. Stutwell .....	[123]	Grealey v. Mousley .....	281
Goddard v. Parr .....	250, 311	Grey v. Jenkins .....	[119]
Godden v. Corsten .....	236	Gridley v. Austen .....	126
Godfrey v. Harrison .....	194, [260]	Grierson v. Astle .....	171
Goggs v. Lord Huntingtower .....	147	Griffith v. Foster .....	[262]
Goldie v. Shuttleworth .....	291	“ Griffith .....	[198], [199]
Golding v. Wharton Rail and River Salt Co. ....	222, 250	Griffiths v. Cowper .....	148
Goldsmid v. Stonehewer .....	186, 187		
Goldsmith v. Goldsmith .....	74		
Goodall v. Burrows .....	[216]		

PAGE.		PAGE.		PAGE.
282	Grimshawe v. Parks. [195], [212], [220],	220]	Hargreave v. Wright [150], [161],	[167]
242	" White .....	[229]	Harkness v. Conway .....	[107]
[139]	Groom, Re .....	167	Harn v. Harn .....	[105]
[119]	Grove v. Sanson .....	[171]	Harnett v. Yielding .....	53
[262]	" Young .....	[127]	Harper, Re .....	[134]
56	Groves v. Groves .....	312	Harper v. Harper .....	169
342	Grundy v. Buckeridge .....	283	Harris, Ex parte .....	[166], [170]
[125]	Guest v. Smythe .....	[164]	" v. Aaron .....	72
Re. [118]	Guibert, Re .....	234	" Andrews .....	165
[199]	Gunn v. Adams .....	[163]	" De Tastet .....	[185]
[226]	" Doble .....	48	" Fleming .....	157, 159
y Co. 78, 79	Gunnell v. Whitear .....	[150], [234]	" Gamble. 33, 38, 206, 218, 303	
148	Gunsong v. Simpson .....	[138], [142]	" Harris .....	[162]
[259], [265]	Guy v. Guy .....	[164], [173]	" Meyers. 51, 335, 337, 345, 359	
246	Gynne v. Rees .....	189	" Owners of Franconia .....	158
[105]	Gzowski v. Beatty .....	350	" Petherick .....	377
[167], [173]		[228]	" Start .....	[127]
[179], [196]			" Warre .....	222, 224
79	H's Estate, Re .....	56	Harrison, Re .....	[162], [165]
251	Hadley, Re .....	[162]	" v. A. & B., Re .....	[124]
39	Hagarty v. Hagarty .....	[103]	" Bottenheim .....	176
[103]	Haig v. Grey .....	184	" Grier .....	[211], [225]
72, 364	" Oussey .....	[126]	" Lentuer .....	241
[357], [209]	Hair, Re .....	[127], [128], [130]	" Patterson .....	[179]
[253], [261]	Haisley, Re .....	51	" Smith .....	[160]
[223]	Hakewell, Re .....	58, 60	Harrold v. Wallis .....	56
283	" v. Webber .....	303	Harry v. Davey .....	202, 207
[205]	Halford v. Yate .....	[214]	Hart v. Lever .....	148
[170], [171]	Hall, Re .....	[124], [125], [138]	Hart v. McQueston .....	49
gypt-	" v. Austin .....	184	Hart v. Montefiore .....	279, [186]
city of	Hall v. Eve .....	221, 243, 244	Hartley, Re .....	[130], [133]
339	Halliday, Re .....	62	" v. Dilkie .....	149
256, 257	Halliman v. Price .....	42	" Owen .....	288
[163]	Halliwell v. Counsell .....	256	" Shernwell .....	346
Grant 28, 62,	Halloway v. York .....	40	Hartnall, Re .....	[157], [158]
135	Hamelyn v. White .....	280, 281, 283	Harvey, Re .....	[153]
379	Hamer v. Giles; Giles v. Hamer. 350, 378		" v. Clark .....	[118]
184	Hamilton & N. W. Ry. Co. v.		" O'Meara .....	141
ining	County of Halton. 54		" Smith .....	379
e and	" v. O'Reilly, Re .....	[124]	Haskins v. Cannon .....	172
378	" Brewster .....	[199]	Hastings v. Hurley .....	155, 395
Com-	" Davies .....	148	Hatch v. Searles .....	[187]
288	" Howard .....	[211], [224]	Hatt v. Park .....	[213]
[178]	" Johnson .....	325, 326	Hattal, Re .....	[163]
[218], [222]	Hampson v. Hampson .....	281	Hawford v. Lloyd .....	288
280	Hamner v. Flight .....	176, 221, 225	Hawes v. Bamford .....	318, 396
379	Hammond v. Walker .....	148	Hawkesley v. Bradshaw .....	270
41	Hancock v. Guerin .....	279	Hawksworth v. Hawksworth .....	59
[118]	Hancox v. Spittle .....	[156]	Hay v. McArthur .....	[222]
406	Handley v. Davis .....	[138], [141]	Haycock, Re .....	[138], [140], [141]
[216], [217]	Hankey v. Morley .....	[141]	Hayes v. Hayes .....	[229]
[230]	Hanman v. Riley .....	186, 187	Hayney, Re .....	[140]
[161], [171]	Hansard v. Hardy .....	242	Hazard v. Lane .....	[127]
Co.. 51	Hansell, Re .....	116	Hazelwood v. De Bergue .....	349
282	Hansford, Re .....	[140]	Headen v. Rosher .....	195
[186]	Hanslip v. Kitson .....	219, 280	Headington, Re .....	[138], [141]
281	Hardcastle v. Maryland and Dela-		Heald v. Hay .....	148
[119]	ware Railway Co .....	54	Heales v. McMurray .....	50
[126]	Harding, Re .....	[134]	Heap v. Morris .....	222, 250
[171]	Hardley, Re .....	[139]	Heard v. Cuthbert .....	[170]
[262]	Hardman, Ex parte .....	[166]	Hearne v. Tennant .....	51
[198], [199]	Hardwick v. Wright .....	[188]	Hedley v. Bates .....	47, 56
148	Hardford, Re .....	[163]	Heely, Re .....	[204], [235]
	Hargrave v. Hargrave .....	330	Heighington v. Grant .....	43
	Hargreave's Settled Estates, Re. [119]		Heinrich v. Sutton .....	162
	" v. Scott .....	391		

	PAGE.		PAGE.
Heming, Ex parte .....	[134], [141]	Honduras Inter-Oceanic Ry. Co. v. Lefevre .....	181, 182, 185, 202, 221
" v. Leifchild .....	391	Honywood v. Honywood .....	48
" Wilton .....	[130]	Hooch v. Boor .....	94
Henderson v. Buskin .....	[103]	Hoodsall v. Baxter .....	133
" Cook .....	258	Hooper, Re .....	[178]
" McMahon .....	143	" v. Burley .....	154
Heney v. Low .....	49	" Gumm .....	281, 283
Henna v. Dunn .....	[185]	" Maitland .....	190
Henneay v. Bowman .....	364	" Strutton .....	[151]
Hercy v. Commercial Bank .....	339	Hope v. Banks .....	250
Henshaw, Re .....	[138]	" Carnegie .....	71, 148
Herbert, Re .....	[165]	" Hope .....	148, 312
Hercy v. Ferrers .....	282	" Liddell .....	282
Heron v. Moffatt .....	[179]	" Threfal .....	318
Herring v. Clark .....	[173]	Hopgood v. Parkin .....	71
Herz v. Union Bank of London .....	32	Hopkinson v. Lord Burghley .....	283
Heugh v. Chamberlain .....	249, 250	Hopper v. Harrison .....	[191], [254]
Heward v. Ridout .....	[200], [233]	Horkins v. Hart .....	151
Hewitt, Re .....	[155], [171]	Horner v. Kerr .....	192, 193
Heywood v. Sievwright .....	[238]	Horsley v. Fawcett .....	187
Hicks v. Rainscock .....	260	Horton, Re .....	[261]
Higginbotham v. Aynsley .....	233	Horwell v. The London General Omnibus Co .....	207
" Hawkins .....	48	Hoskins, Re .....	71, 378, [141], [166]
Higgins v. Manning .....	379	Houlding v. Poole .....	186
" Woolcot .....	[130]	Houseman v. Houseman .....	46
Higginson v. Hall .....	280	Hovey v. Ferguson .....	[107]
Highton v. Treherne .....	78	Howard v. Brown .....	231
Hill v. Hill .....	59	" Macara .....	[214]
" Ironsides .....	[137]	" Robinson .....	283
" Rimell .....	367	" Re Padley v. Camphau- sen .....	156
" Walker .....	[186]	Howcut v. Rees .....	274
Hilliard, Re .....	[164]	Howe v. Howe .....	[104]
Hills v. McCrae .....	184	" Hunt .....	[101]
" The London Gas Light Co .....	291	" Kernon .....	[283]
Hindley v. Emery .....	[101]	" Machine Co. v. Walker .....	156
Hinton, Re .....	[127]	Howell v. McFarland .....	51
Hipwell v. Knight .....	51	" West .....	213
Hirons, Re, Foster v. Hirons .....	[264]	Howeren v. Bradburn .....	[222]
Hoare, Re .....	342, [119], [141]	Howkins v. Bennett .....	148
" v. Wilson .....	284	Howland v. Grierson .....	154
Hobbs v. Reid .....	199	Howlett v. Wilbraham .....	152
Hobby v. Pritchard .....	[127]	Houston v. Briscoe .....	357
Hobhouse v. Holcombe .....	[198]	Hubbard, Re .....	391, [135]
Hobson v. Wadsworth .....	162	" v. Hubbard .....	[160]
" Sherwood .....	[198]	Hue, Re .....	[141]
Hoby v. Hitchcock .....	379	Huggins v. Guelp <sup>+</sup> Barrel Co. .....	235
Hodges, Re .....	[137], [140], [151], [153], [155]	Huggons v. Tweed .....	43, 219
" v. Hodges .....	237, 250	Hughes, Re .....	[104]
" Fincham .....	342	" v. Hughes .....	277
Hodkinson v. French .....	[219], [237]	" Jones .....	303
Hodson, Re .....	[162]	" Metropolitan Ry. Co .....	44
" v. Cash .....	162	" Wills .....	[167]
" Drewery .....	71	Hulcomb v. Leach .....	393
" Mochi .....	38	Hulme v. Tenant .....	190
Hoffman v. Postman .....	288	Humber Iron Works, Re .....	162
Holland, Re .....	[128]	Hume v. Burton .....	[109]
" & Walsh, Ex parte .....	[183]	Humphrey, Re .....	[162]
Hoole v. Great Western Ry. Co. .....	197	Hunt v. Hunt .....	[103]
Hollingsworth v. Brodrick .....	361	" Passmore .....	335
Holloway v. Phillips .....	402	Hunter v. Daniel .....	[123]
Holmes, Re .....	[111]	" Young .....	208
" v. Tutton .....	351	Hurle's Settled Estates, Re .....	[119]
Holt v. Jesse .....	70	Hurst v. Hurst .....	148
Home Assurance Association, Re .....	380, 381		

## TABLE OF CASES.

xxix.

PAGE.		PAGE.		PAGE.
85, 202, 221	Hurst v. Padwick .....	379	Johnson v. Ashbridge.....	[214], [232]
48	Husband, Re .....	396	" Barnes .....	135
94	Hutchinson, Re .....	[119], [140]	" Brown .....	296
133	" v. Glover .....	280	" Gallagher .....	190, 191
[178]	" Sargent .....	[239]	" Johnson .....	327
154	" Stephens .....	[151], [152]	" Peck .....	[123]
281, 283	Hyde v. Warden .....	57	" Trustees of Public	
190	Hymans v. Roots .....	74	School Section No. 1, Township	
[151]			of Howard .....	330
250	Ilderton, Re .....	[128]	Joint Stock Discount Co., Re .....	284
71, 148	Imperial Bank v. Sumerfeldt .....	327	Jones, Re, [130], [133], [138], [142], [170]	
148, 312	" of China v. Bank		Eyre v. Cox .....	145, 395
282	Hindustan .....	380	" v. Chennell .....	73
318	" Loan & S. Co. v. Boul-		" James .....	201, [165]
71	ton .....	[221]	" Jenner .....	352
283	Inchley v. Allslop .....	357	" Jones .....	283, [259]
[191], [254]	Ingilby v. Shafto .....	281	Joyce, Re .....	[148], [162]
151	Ingle, Re .....	[128]	Junkin v. Junkin .....	380
192, 193	Inglis v. Beatty .....	[185]	Jupp v. Cooper .....	346
187	" Wellington Hotel Co. ....	132	Geering .....	[123]
[261]	International Financial Society v.			
207	Moscow Gas Company .....	78, 405	Kadehem, Re .....	[158], [165]
[141], [166]	Irby, Re .....	[138]	Kahn v. Redford .....	275
186	Irving v. Boyd .....	335	Kay v. Hargreaves .....	281, 288
46	Munn .....	[219]	Keate v. Phillips .....	202
[107]	Strait .....	148	Keeler, Re .....	[153], [155]
231	Ivory v. Cruikshank .....	336, 355	Keenan, Re .....	[114]
[214]			Keene v. Ward .....	[126]
283	Jack, Re, Jack v. Jack [241], [261], [262]		Keiffenstein v. Hooper .....	51
156	Jacks, Re .....	116	Keim v. Yeagley .....	387
274	Jackson v. Gardner .....	359, 368, 376	Keith v. Keith .....	[105]
[104]	" Jackson .....	335, [103]	" Lynch .....	276
[101]	" Milfield .....	[148]	Kellaway v. Johnston .....	187
[283]	" N. E. Ry. Co. ....	355, 356	Kelly, Re .....	[108]
156	" North Wales Ry. Co. ....	263	" v. Macklem .....	161
51	" Randall .....	140	Kemp v. Jones .....	251
213	" Robertson .....	248	" Mackerel .....	[123]
[222]	" Spittal .....	157	Kempton, Re .....	[138]
148	" Ward .....	359	Kenaway v. Tripp .....	379
154	Jacob, Re .....	[178]	Kennedy, Re .....	[116]
152	Jacobs v. Magnay .....	164	" v. Brown .....	74
357	James v. Crow .....	304	" Lawlor .....	290
391, [135]	" Robertson .....	169	" Pingle .....	[179], [253]
[160]	Jameson v. Jones .....	312	" Royal Insurance Co. ....	284
[141]	" Lang .....	145	Kensington v. Dolland .....	189
235	Jardine v. Wood .....	[186]	Ker, Re .....	[132]
43, 219	Jarvis v. Great Western Ry. Co. ....	[128]	Kernick v. Kernick .....	311
[164]	" Stinson .....	77	Kerr, Re .....	[130]
277	Jay v. MacDonnell .....	[196]	" v. Finlayson .....	246, 248
303	Jebb v. Tugwell .....	357	" Grand Trunk Ry. Co. ....	306
44	Jefferson v. Warrington .....	[127]	" Murray .....	187
[167]	Jeffrey v. Drysdale .....	[167]	Kettlewell v. Barstow .....	283
393	Jeffreys v. Evans .....	[126]	Keys and Smith & Henderson, Re .....	[125]
190	Jellett v. Anderson .....	[229]	Kidd v. Cheyne .....	[192]
162	Jenkins, Re .....	[140]	Kilkenny, etc., Ry. Co. v. Feildon. ....	141
[109]	" v. Davies .....	328	Kimpton v. Eve .....	365
[162]	" Martin .....	[106]	Kincaid v. Kincaid .....	[237]
[103]	Jenkyn v. Bushby .....	281	Kindull v. United States .....	54
339	Jenour v. Jenour .....	[123]	King, Re .....	[124]
[123]	Jephson, Re .....	[139], [140]	" v. Bryant .....	345
[119]	Jervoise v. Clark .....	[202]	" Connor .....	[196], [214], [231]
148	Jesse v. Bennett .....	[260]	" Corke .....	246
	Jessop, Re .....	[133]	" Davenport .....	265
	Joddrell v. Joddrell .....	250	" Freeman .....	[209], [223]
	Johnasson v. Bonhole .....	263	" Greenhill .....	58
	Johns v. James .....	276	" Keating .....	187

	PAGE.		PAGE.
King v. King .....	[171]	Lazier v. Ranney .....	[219]
" Rudkin .....	358	Lea, Re. ....	[155]
" Smith .....	[170]	Leake, Re. ....	[141]
King of Hanover v. Bank of Eng- land .....	[162]	Leaming v. Moore .....	80
Kingchurch v. The People's Gar- den Co. ....	45	Lechmere v. Clamp. [151], [161], [167]	
Kingsford v. Swinford .....	33	Ledyard v. McClean .....	195
Kingsland, Re. ....	[138]	Lea v. Colyer .....	44
Kinneir, Re. ....	[134]	" Gorrie .....	352
Kino v. Rudkin .....	203, 247	" Hammerton .....	283
Kirchoffer v. Stafford .....	[215]	Leening v. Hagarman .....	339
Kirkpatrick v. Howell .....	[209], [258]	Lees, Re. ....	[130], [133]
" Powell .....	[223]	" v. Coulton .....	[161]
Kitching v. Kitching .....	214	" Patterson .....	40, 219
Kitchen v. Kitchen .....	225	Legg v. Mackrel .....	[162], [171]
Kline v. Kline .....	[256]	Winstanley .....	148
Knatchbull v. Fowle .....	310, 318	Legge, Re. ....	[119]
Knight, Re. ....	[141]	Leigh, Re. ....	[117]
" v. Cory .....	379	Leibes v. Ward, Re. ....	65
" Knight .....	[174]	Leigh, Re. ....	61, 95, 96, 293
Knott v. Cottee .....	[230]	" v. Brooks .....	94
Knottinger v. Barber .....	[217], [230]	Leishman v. Eastwood .....	197
Knowlton v. Knowlton .....	380, 381	Lemon & Peterson, Re. ....	[128], [131]
Knox v. Brown .....	242	Lenaghan v. Smith .....	201
Koen v. Koen .....	161	Lepsey v. Cruise .....	148
Korman v. Tookey .....	391	Leslie v. Hambleton .....	[225]
Kraemer v. Glas .....	191	" Thompson .....	295, [120]
Krehl v. Burrell .....	75	Lesslie v. Leaby .....	291
" Park .....	72	Lester v. Archdale .....	231, 244, 252
Kuch v. Hall .....	50	" Lazarus .....	[126]
L. & M., Re, Solicitors .....	[124]	Lett, Re. ....	[127], [134]
Labadie v. Darling .....	129, 138	" v. Parry .....	288
Laidlaw v. Jackes .....	[261]	" The Commercial Bank of Canada .....	192
Laing's Settled Estates, Re. ....	[118]	Lewers v. Earl of Shaftesbury ..	[101]
Laird v. Briggs .....	77	Lewes, Re. ....	[170]
Laird v. Stanley .....	277	" v. Morgan .....	365
Lake v. DeLambert .....	[163]	Lewin, Re. ....	[127]
Lamb v. Allen .....	51	Lewis, Re. ....	[128], [135]
" Sutherland .....	51	" v. Barks .....	361
Lanaghan v. Smith .....	[259]	" Hillman .....	[141]
Lancaster v. DeTrafford .....	[101]	" Howell .....	291
Land Credit Society, Re. ....	281	" Primrose .....	[126]
Lane, Re. ....	[138], [141]	Ley v. Brown .....	[132]
" v. Debenham .....	295	Liddiard, Re. ....	[163]
" Glenny .....	[126]	Lidlitter v. Long .....	262
Langley, Re. ....	335	Life Association of Scotland v. Walker .....	[179]
" v. Earl of Oxford .....	291	Lincoln P. Methodists, Re. ....	[162]
Langridge v. Campbell .....	272, 376	Lind v. Isle of Wight Ferry Co. ..	281
Large v. Large .....	129	Linday v. Gladstone .....	284
Larkin v. Armstrong .....	[195], [264]	Lindsay Petroleum Co. v. Pardee ..	278, 280, 285
Lash, Re. ....	[137]	Lister v. Leather .....	242
Lashley v. Hogg .....	[186], [246]	Little, Re. ....	[166]
Laslett v. Cliffe .....	[206]	" v. Brunker .....	[228]
Laundy v. Roe .....	154	Litton v. Litton .....	328
Law v. London Indisputable Policy Co. ....	280	Livingstone v. Wood .....	[264]
Lawrence, Re. ....	[140]	Lloyd, Re. ....	58, [138], [140], [187]
" v. Campbell .....	2-1	" v. Dimmack .....	184, 355, 356
" Humphreys .....	[220]	" Smith .....	184
Lawson v. Laidlaw .....	190, 192, 195, 196	" Solicitors' Life Ass. Co. ....	165
Layard v. Maud .....	[215]	" Wait .....	[184]
Laycock, Re. ....	[234]	Lloyd's Banking Co. v. Ogle .....	176
Lazarus, Re. ....	[141]	Lockart v. Gray .....	349
" v. Mozeley .....	280, 288	" Hardy .....	[127]
		Lockett v. Carry .....	282

## TABLE OF CASES.

xxx.

PAGE		PAGE		PAGE	
[219]	Lockett v. Lockett	288	Machell v. Campbell	[207]	
[155]	Lockwood v. Nash	353	Mack v. Ward	397	
[141]	Lodge v. Pritchard	[188]	Mackenzie v. Mackenzie	318, [157]	
80	Lomax v. Kilpin	162	Mackereth v. Glasgow and South		
[161], [167]	London & Canadian v. Everett	[224]	Western Railway Co.	154	
195	" " Morrison	[207]	Maclean v. Draper	56	
44	" " Pulford	[227]	Macpherson v. Macpherson	[105]	
352	" " [227], [235]	[207]	Maddison v. Chapman	[240]	
283	" " [227], [235]	[207]	" Skeln	[119]	
339	" Birmingham and Bucks	97	Main v. Kerr	[209], [224]	
[130], [133]	" Ry Co., Re	290	Mainwaring, Re	[157]	
[161]	" Syndicate Co. v. Lord	290	Mais, Re	[162]	
40, 219	Long v. Crosaley	203	Maitland v. Second	339	
[162], [171]	" Long	335	Major v. Lamsley	195	
148	Longman v. East	92, 94, 95, 96	Malcolm C. Cameron, Re	[128]	
[119]	Longstaffe's Settled Estates, Re	[119]	" O'Callaghan	[199]	
[117]	Lonsdale, Re	[166]	Male v. Bouchier	337	
65	Lord, Re	[189]	Malins v. Greenway	[123]	
1, 95, 96, 293	" v. Purchase	56	Mallinson v. Mallinson	60	
94	" Cardross, Ex parte	[126]	Manley v. Berwicke	280, 282, 379	
197	" Compton v. Oxenden	49	Manchester and Milford Railway		
[128], [131]	" Darnley v. L. C. & D.	246	Co., Re	56	
201	" Railway	246	Manchester, Sheffield, and Lin-		
148	" De Tabley's settled estates,		colnshire Railway Company		
[225]	Re	[119]	and the London and North-		
295, [120]	" Eglington v. Lamb	282	western Railway Company v.		
291	" Hanmer v. Flight	176, 221, 225	Brooks	38, 218	
231, 244, 252	" Huntingtower v. Sherborn	128	Mainstay v. Kenealy	215	
[126]	" St. John v. Lady St. John	250	Mann v. Perry	366	
[127], [134]	" Ward's Case	[111]	Mansel, Re, Rhodes v. Jenkins	77	
288	Lorenz, Re	[178]	" v. Feeney	281, 284, 288	
192	Lorimer, Re	[142]	Mansfield v. Childerhouse	276	
191	Loveden v. Milford	312	Mant v. Smith	[126]	
[170]	Loveless v. Richardson	342	Martindale v. Clarkson, Re	[220]	
365	Lowe v. Lowe	75	Marbury v. Maddison	54	
[127]	Lowes v. Lowes	357	Marker v. Marker	48	
[128], [135]	Lowry, Re	[145], [151], [161]	Markham, Re, Markham v.		
361	Lows, Re	304	Markham	80	
[141]	Lowden v. Mayor of Colchester	[123]	Markner, Re	[119]	
291	Luck v. Handley	235	Marnes, Re	[140]	
[126]	Ludgater v. Channell	[199]	Marquis of Bute's Will, Re	[152]	
[132]	Luke v. South Kensington Hotel		" Londonderry v. Rhos-		
[163]	Co.	202	wydol Lead Mining Co	204	
262	Lumley v. Hughes	379	Marriott v. Anchor Reversionary		
	Lund v. Blanchard	[260]	Co	281	
	Lunda v. McCulla	34	" Kirkham	187	
[179]	Lundy v. Dickson	349	Marriott's Trusts, Re	[163]	
[162]	Lunn, Re	[158]	Marrow, Re	[170]	
281	Luther v. Ward	382	Marsden v. Lancashire and York-		
284	Lydall v. Martinson	249, 306	shire Railway Co	75	
278	Lyon v. Tweddell	276	Marsh v. Attorney-General	[178]	
280, 285	Lyons v. Blenkin	189	" Beard	379	
242	Lysaght v. Edwards	[151], [161]	" Keith	281	
[166]	Lytleton v. Cross	233	" Marsh	[241], [261], [262]	
[228]			Marshall, Re	[163], [166]	
328	MacAllister v. the Bishop of Ro-		Martin, Re	[125]	
[264]	chester	208	" v. Headon	[101]	
[140], [187]	Macan v. Borradaile	381	" Purdy	200	
184, 355, 356	Macauley v. Rumball	350	" Reid	[262]	
184	MacDonald, Re	[128], [133]	Mason, Re	[116], [142]	
s. Co. 165	" v. Bode	44	" v. Brentini	42	
[184]	" Carrington	381, 215, 219	" Jeffrey	380	
176	" Macdonald	[105]	" Seeney	321, 337, 345, [219]	
349	MacDonnell v. Street	251	Masselin, Re	[140]	
[127]	" McKay	283, 284	Massey, Re	[133]	
282	Macchar v. Vandewater	330	Mather v. Short	289	

	PAGE.		PAGE.
Matthew v. Northern Assurance Co. ....	[138], [140], [141]	McGregor v. Keiley .....	[126]
Matthews, Re .....	[162], [166]	McHenry v. Davies .....	191
“ v. Chicester .....	379	McIlroy v. Hawke .....	359, 368, [225]
Matthewman's, Mrs., case .....	191	McIntosh v. Great Western Ry. Co. ....	97, 282
Mathias v. Mathias .....	129	“ Ontario Bank .....	[227]
Mattoch v. Heath .....	281	McIntyre v. Connell .....	184
Mant v. Smith .....	[126]	“ Kingley .....	169, [111]
Mavety v. Montgomery ..	[219], [237]	McKay v. McKay .....	[103]
Mavor v. Dry .....	253	“ Mitchell .....	349
Maxwell v. Maxwell .....	385, [193]	“ Tait .....	349
May v. Biggenden .....	[130]	McKenna v. Everitt .....	312
“ Prinsep .....	318, 396	McKenzie v. Harris .....	142
“ Selby .....	187	“ Montreal and City of Ottawa Junction Ry. Co. ....	51
Mayberry v. Brooking .....	[192]	“ Sinton .....	379
Mayes v. Mayes .....	318	“ Stewart .....	307
Maynard, Re .....	[163], [166]	“ Vansickles .....	202, 247
Mayor of Berwick v. Murray ..	184	“ Wiggins .....	[237]
“ Birmingham v. Allen ..	95	McKinnon v. Anderson .....	[232]
McAlpine v. Carling .....	46, 231	McLaren v. Caldwell .....	55
“ Young ..	[201], [202], [233]	“ Miller .....	[218]
McAndrew v. Baker .....	75, 77	McLay v. Sharp .....	206, 238
“ Laflamme ..	[239], [262]	McLean, Re .....	[138]
McAvilla v. McAvilla .....	275	“ v. Grant .....	[234]
McCarglar v. McKinnon .....	[194]	McLeod v. Annesly .....	201, [259]
McCay, Re .....	[129]	McLennan v. Heward, [178], [179],	[180]
McClaren v. Sudworth .....	349, 350	“ McLean .....	[229]
McClay v. Sharp .....	37	McMannus v. Little .....	[205], [236]
McClean v. Grant .....	150	McMaster v. Beattie .....	327
“ Maitland .....	[132]	McMichael v. Thomas .....	[209]
McClellan v. Jacobs .....	[206]	McMillan, Re, Patterson v. McMillan ..	[254]
McClennan v. Helps .....	315, [185]	“ v. McDonald .....	306
McConnell, Re .....	188, [184]	“ McMillan .....	[179]
McCormack v. Melton .....	339	McMorris, Re .....	[236]
McCormick v. McCormick ..	[224]	McMurray v. Grand Trunk Ry. Co. ....	262, 265, 273
“ Park .....	350	“ Spicer .....	[151]
McCready v. Higgins .....	194	McMurrich v. Hogan .....	148
McCulloch v. McCulloch .....	[104]	McNabb v. Gwynne .....	248
McDermid v. McDermid .....	278, [235]	McNally v. Stephens .....	342
McDougal, Re .....	[113]	McNaughton v. Webster .....	349, 353
“ v. McDougal .....	[107]	McNulty, Re .....	[110]
McDowell v. McDowell .....	335	McPherson v. McCabe .....	197
McDonald, Re .....	[116]	McQueen v. McQueen .....	391
“ Macdonald & Marsh, Re .....	[133]	McRoberts v. Durie .....	[203]
“ v. Burton .....	133	“ Hamilton .....	339
“ Garrett .....	[116]	McSherry, Re .....	[108]
“ Gordon .....	204	McTavish v. Symson .....	147
“ McGillis .....	[261]	McVeagh, Re .....	[178]
“ McMillan .....	148	Mearns v. Grand Trunk Ry. Co. ..	132
“ Putnam .....	281	“ Petrolia .....	56
“ Rodger .....	[196], [225]	Mein, Re .....	[110], [111]
“ Wright .....	[184], [196]	Meldrun v. Tulloch .....	349
McEdwards v. McLean .....	226	Mellin v. Monico .....	92, 94
McGachen v. Dew .....	184	Mellor v. Sidebottom .....	327
McGrath, Re .....	[114]	Melnish v. Milton .....	364
McGill v. Courtice ..	[241], [260], [261]	Memorandum, Re .....	378
McGillivray v. Cameron .....	[215]	Mendes v. Guedalla .....	202
“ Griffin .....	74	Mennard v. Welford .....	[162]
“ McConkey, 229, 246, 249, 251, 252		Mentens v. Haigh .....	283
McGinnis v. The Corporation of Yorkville .....	353	Menzies v. Ridley .....	[240]
McGiverin v. James .....	157	Merchants' Bank v. Grant .....	71
McGrath v. McGrath .....	[104]	“ Pierson .....	275



## TABLE OF CASES.

xxxiii.

PAGE.		PAGE.		PAGE.
[126]	Merchants' Bank v. Sparks. [221], [222]	280	Morley v. Morley	187
191	" Tisdale	280	Mornington v. Mornington	282
[225]	Merriam v. Cronk	[226]	Morphy & Kerr, Re	[126]
97, 282	Merrick v. Sherwood	191, 196	Morris v. Boulton	339
[227]	Merrill v. McFarren	347	" Manesty	141
184	Mertens v. Haigh	280	Morrison v. Morrison	345
[111]	Merry's Estate, Re	[119]	Morrow v. Wilson	381
169, [103]	Metcalfe, Re	[141]	Morshead v. Reynolds	[187]
349	" v. Davis	128, 139	Mortimer v. West	188
349	Metropolitan Board of Works v.		Morton v. Miller	223, 366
312	The New River Co.	296	Moseley, Re	[138]
142	Metropolitan Building and Sav-		" v. Rendall	215
	ings Society v. Rodden	327	Moss, Re	[128]
	Metropolitan Railway v. Defries	221	Mostyn v. The West Mostyn	
	Meyers v. Harrison	[206]	Coal and Iron Co., (limited)	32, 37, 219
51	" Lake	143	Mounsey v. Burnham	263
379	Meyrick, Re	[155]	Mount, Ex parte	[112]
307	" v. James	320	Mountain v. Porter	[214]
202, 247	Mitchell, Re	[178]	" Young	[138]
[237]	Michie v. Reynolds	132, 339	Mozley v. Cowie	247
[232]	Micklewait v. Micklewait	48	Muggeridge, Re	[178]
55	Middleton v. Dodswell	56	Muirhead v. The Direct United	
[218]	" Greenwood	[102]	States Cable Co. (Limited)	175
206, 238	Mildmay v. Methune	97	Mullarky, Re, McAndrew v.	
[138]	Miles, Re	[177]	Laflamme	79
[234]	Milfield, Re	[148]	Mullin v. Bonjor	139
201, [259]	Millissich v. Lloyd's	326	Mullins v. Howell	71
[179], [180]	Millar v. McNaughton	[240]	Mundell, Re	[153], [163]
[229]	Miller, Re	[110]	Murney v. Knapp	148
[205], [236]	" v. Attorney-General	[100]	Murphy v. Lampier	[116]
327	" Hill	143	" Murphy	[260], [262]
[209]	" Macnaughten	[182]	Murray v. Barlee	[127]
	Mills v. Choate	[232]	" Frank	217, [108]
[254]	" Dixon	[214]	" French	25
306	" Jennings	185, 187	Munch v. Cockerell	201
[179]	Milne, Re	[109]	Munro v. Munro	62, [103]
[236]	" v. Lamson	298	Murrow v. Wilson	[127]
	Minchin, Re	[168]	Mutlow v. Mutlow	[141]
282, 265, 273	Minet v. Morgan	281	Myers v. Defries	377
[151]	Mitchell v. Cobb	[139]	" Myers	335, [235]
148	" Goodhall	51		
248	" Mitchell. [184], [203],	[235]	Nalder v. Hawkins	189
342	" Wilson	305	Nanny v. Edwards	[214]
349, 353	Mobbs, Re	[127]	Nash v. Glover	79
[110]	Mockett, Re	[178]	Nathan v. Batchelor	257
197	Moffatt v. Hyde	334	Naylor, Re	[140]
391	" Prentice	274	" v. Farrer	35, 41, 43
[203]	" White	[219]	Neads v. McMillan	73
339	Money, Re	[140]	Neate, Re	[134]
[108]	Money penny v. Dering	251	Neave v. Avery	33
147	Moodie v. Bannister	186	Needham v. Oxley	[101]
[178]	" Thomas	132	Nelles v. Vandyke	331, [256]
132	Moody v. Tyrell	[231]	Nelson, Ex parte	342
56	Moore v. Boyd	273, 277	" v. Nelson	335
[110], [111]	" Connecticut Mutual Life		" Roy	128
349	Insurance Co.	69	Neveux v. Labadie	[219], [237]
92, 94	" Merritt	[218]	New Westminster Brewery Co. v.	
327	" Roseburgh	145	Hannah	202, 310, 318
364	Moran v. Schemerhorn	143	Newbiggin-by-the-Sea v. Arm-	
378	Moravian Society, Re	[162]	strong	27, 135, 142
202	Morrell v. Morrison	274	Newby v. Harrison	[102]
[162]	Morgan v. Higgins	[126]	" Van Oppen	154, 156
283	" Scudamore	[123]	Newcomen v. Coulson	240
[240]	" Swansea. [150], [151],	[153]	Newell v. The National Provin-	
71	" Worthington	257	cial Bank	37, 38
275	Morley v. Mathews	[196]	Newen v. Wetten	[184]



	PAGE.		PAGE.
Newington v. Levy .....	233	Ord v. Fawcett .....	282
Newman, Re. [110], [111], [128], [135]		Orford v. Bailey .....	[211]
" v. Rook .....	352, 353	Orger v. Sparke .....	[160]
" Warner .....	[161]	Oriental Bank v. Fitzgerald .....	176
Newton, Re .....	318, 395	" Navigatin Co. v. Briggs .....	262
" v. Boodie .....	391	Original Hartlepool Collieries Co.	
" Ricketts .....	[127]	" v. Gibb .....	39, 231
Nicholl v. Allen .....	54	Osborne, Re .....	[148], [151], [152]
" Jones .....	280	" v. Jullion .....	262
Nicholls, Re .....	[158]	Ottey v. Pensam .....	[194]
" v. McDonald .....	[194], [195]	Outram v. Wyckhoff .....	[238]
Nicholson, Re .....	[129]	Owen v. Homan .....	57, [198]
" v. Jackson .....	43, 44	Owens v. Dickenson .....	[186], [190], [191]
" Peile .....	359	Oxenden v. Compton .....	[111]
Nimmo v. Welland .....	347		
Noad v. Murrow .....	202, 247	Packington's case .....	48
Noble v. Stow .....	357	Paddon v. Winch .....	74
Noel v. Ward .....	[194]	Padwick v. Scott .....	35, 36, 218
Nokes v. Wharton .....	[134]	Paine v. Chapman .....	258
Nolan v. Nolan .....	[104]	Painter, Ex parte .....	[170]
Nonell v. Hullett .....	349	Palairot v. Carew .....	[171]
Norris v. Beazley .....	202	Palmer v. Walesby .....	142, 217
" Bell .....	[240]	" Winstanley .....	[231]
" The Irish Land Co .....	55	Papayanni v. Coultpas .....	176
North v. Huber .....	282	Paraire v. Loible .....	270
" Central Waggon Co. v.		Parby, Re .....	[161]
North Wales Waggon Co	175	Parby's Settlement, Re .....	[119]
" of Scotland Mortgage Co.		Parke, Re .....	[164]
v. German .....	49	Parker, Re .....	[166]
" Wheal Exmouth Mining		" Cash v. Parker .....	356
Co., Re .....	274	" v. Brown .....	165
Northern Railway Co. v. Lister .....	133	" Vinegrowers .....	[222]
Norton v. Florence Land and		Parkinson v. Hanbury .....	391, [226]
Public Works Co. ....	158	Parnell v. Hingston .....	[163]
Norway v. Norway .....	[171]	Parpaite Freres v. Dickinson .....	131
Nott v. Riccard .....	51	Parry, Re .....	[119]
Nowell v. Andover Railway Co. ....	262	" v. Howell .....	[240]
Noyes v. Crawley .....	258	Parsons v. Harris .....	223, 328
Nudel v. Elliott .....	[238], [261]	" Tining .....	377
Nurse v. Dunford .....	142	Passmore, Re .....	[127]
		" v. Nicholls .....	148
Oakely v. Toronto, Grey and		Patch v. Ward .....	283, [232]
Bruce Railway Co. ....	278	Patterson v. Kingsley .....	51
O'Brien v. Lewis .....	[126]	" Miller, Re .....	[124]
O'Connor v. McNamee .....	51	" Robb .....	[204], [236]
" Sierra Nevada Co. ....	379	Pattinson, Re .....	[149]
" Woodward .....	[202], [233], [234]	Pattison, Re .....	[241]
Odell v. Doty .....	[216], [235]	" v. McNabb .....	306
O'Donnell, Re .....	[174]	" Wooller .....	310, 318
O'Donohoe & Warmoll, Re. [127], [128]		Patton, Re .....	[111]
" v. Wiley .....	157	Paul v. Johnson .....	[227]
Ogden v. Battams .....	[188]	Paxton v. Jones .....	277
" McArthur .....	194	Payne v. Little .....	188
Oglander v. Oglander .....	164	" Parker .....	186
Ogle, Ex parte .....	72	Peach, Re .....	[130]
O'Grady v. Munro .....	379	Peacock v. Harper .....	319
O'Keefe v. O'Brien .....	306	Pearce v. Watts .....	258
Oldale v. Whitther .....	379	Peareth v. Marriott .....	[119]
Olive, Re .....	[119]	Pearson, Re .....	[141]
Oliver v. Dickey .....	312	" v. Campbell .....	148
O'Lone v. O'Lone .....	[107]	" Lane .....	208
Ommaney, Ex parte .....	[170]	" Ward .....	312
O'Neil v. Clason .....	153	" Wilcox .....	396
Ontario Bank v. Sim .....	[204]	Pease v. Fletcher .....	57
" Sirr .....	[236]	Peek v. Spencer .....	248
		" Trinsmaran Iron Co. ....	57

## TABLE OF CASES.

XXXV.

PAGE.		PAGE.		PAGE.
282	Peers, Re..	[130]	Pontifex v. Severn.....	52
[211]	Peile, Re	[130]	Popplewell & Capreol v. Abbott.	154
[160]	" v. Stoddart	281	Poolley v. Driver .....	296
176	Peketham v. White .....	283	Porter, Re .....	[149], [162], [163]
Briggs 262	Pellas v. Neptune Marine Ins. Co.	37	Portman v. Patterson .....	73
ies Co.	Pender, Re.....	[126]	" Paul .....	[211]
39, 231	Pendry v. O'Neill .....	381	" Smith.....	[217]
[161], [162]	Penn v. Lockwood.....	168	Post v. Leys .....	327
262	Penner v. Canniff.....	[225]	Postmaster-General v. Robertson	51
[194]	Penney v. Goode .....	282	Potter v. Chambers .....	41, 42, 219
[238]	Pennington v. Lord Muncaster..	[194]	" Rankin .....	391
57, [198]	Penny v. Francis .....	[239]	Potts, Re .....	[119]
[190], [191]	People v. City of Chicago .....	54	" v. Leighton.....	[199]
[111]	" Darling .....	54	Poulton v. Lee .....	146
48	" Mayor of New York ..	54	Powell v. Jewesbury .....	253, 257, 259
74	" State Treasurer .....	54	" Lea .....	277, 289, 327, 328
35, 36, 218	People's Garden Company, Re ..	45	" Mathews .....	[150]
258	" Loan Co. v. Bacon.....	[236]	" Oakley .....	[119]
[170]	Pepper v. Pepper .....	330	" Walworth .....	[182]
[171]	Peppit's Estate, Re, Chester v.	199	Powers v. Merriman .....	[215], [230]
142, 217	Phillips .....	199	Prees v. Coke .....	[230]
[231]	Perkins, Re .....	[127]	Prentiss v. Brennan .....	56, 335, 345
176	Perot v. Novelli .....	378	Prescott, Re .....	[166]
270	Perrin v. Perrin .....	[102], [241]	Prestwich v. Poley .....	71
[161]	Perry v. Knott .....	187	Price, Re .....	[132]
[119]	Petee, Re, McKinley v. Beadle..	[239]	" v. Bailey .....	313
[164]	Peters v. Peters .....	291	" Berrington .....	217
[166]	Peterson v. Peterson .....	[104]	" Gardner .....	402
356	Petit v. Ambrose .....	148	" Webb .....	136
165	Pett's Will, Re .....	[177]	Prideaux, Ex parte .....	[126]
[222]	Peyton, Re .....	[156], [178]	Primrose, Re .....	[171]
391, [226]	Phelan, Re .....	[116]	Pritchard v. Fleetwood .....	56
[163]	Pherill v. Pherill .....	337	Prince, Re .....	[128]
son.....	Physey v. Physey .....	75	" v. Hine .....	162
[119]	Philby v. Hazle .....	[128]	" Lough .....	258
[240]	Phillips, Re .....	[170]	Pringle v. Glog .....	384, 389
223, 328	" and Gill, Re.....	366	Proctor v. Grant .....	277, 289
377	" v. Harris .....	291	Proper, Re .....	[148]
[127]	" Holmes .....	283	Prosser v. Mossop .....	[259]
148	" Phillips .....	221, 250	Protector Endowment Company	
283, [232]	" Prentice .....	318, 396	v. Whitlam .....	347
51	" Winters .....	167	Prothero v. Thomas .....	[130]
[124]	Phillipson v. Gatty .....	187	Proudfoot v. Bush .....	168
[204], [236]	Phippen v. Brown.....	357	Provident Permanent Building	
[149]	Phipps v. Danbury .....	[126]	Society v. Greenhill .....	268
[241]	Phosphate Sewage Co. v. Molleson	46	Provident Permanent Building	
306	Pickance, Re .....	[166]	Society v. Pryse .....	[166]
310, 318	Pickard v. Hine .....	190, 196	Pugh, Re .....	[127], [129], [134]
[111]	Pickford v. Brown .....	357	Purnell v. Great Western Ry. Co.	29, 323
[227]	Piercy v. Young .....	44, 300	Puttrell, Re .....	[140]
277	Pierson v. Barclay .....	184		
188	Pigeon v. Bruce .....	148	Quantz v. Smelser .....	143
186	Piggott v. Piggott .....	187	Queen Insurance Co. v. Boyd ..	327
[130]	Pike v. Fitzgibbon .....	195	" " Scott .....	138
319	" Keene .....	144, 288	" " Smith .....	140, [234]
258	Pilcher, Re, Pilcher v. Hind ..	214, 395	Queen's College, Ex parte .....	[141]
[119]	Pilling, Re .....	72	Quinlan, Re .....	[155]
[141]	Pince v. Beattie .....	[128]	Quinn v. Hession .....	35, 36, 44
148	Pipe v. Shafer .....	[215]	" Ratcliffe.....	280, 281
208	Pitt, Re .....	[161]		
312	Pledge v. Buss .....	253	Radclyffe v. Duffy .....	[215]
396	Plinty v. West .....	[163]	Radenhurst v. Reynolds .....	334
57	Plumer v. Gregory .....	184	Rae v. Geddes .....	[236]
248	Plyer, Re .....	[152]	" Shaw .....	[215], [230]
Co....	Pommerania, Re.....	241	Rafael v. Ougley .....	149
	Pongerard, Re .....	[174]	Rainy v. Bravo .....	247

	PAGE.		PAGE.
Ramsay v. McDonald.....	[233]	Rhodes v. Neild.....	288
Rance, Re.....	[134]	Rice v. C. orge.....	[107]
Randall, Re.....	[157]	Richards, Re.....	[138], [166], [170]
Ranger v. Great Western Ry. Co.	280	" v. Goddard.....	320
Rann v. Lawless.....	188, 197	" Kitchin.....	346
Ransome, Re.....	[128]	" Parkins.....	56
Raphael, Re.....	[162]	Richardson, Re.....	[128], [130]
Rathbone, Re.....	[162]	" v. Elmit.....	350
Ratray v. George.....	251	" Greaves.....	352
" Bishop.....	365	" Grubb.....	[171]
Rawley v. Rawley.....	37	" Miller.....	188
Rawlings v. Lambert.....	262	Riddell v. Ritchie.....	356
Rawlinson v. Moss.....	[132]	Ridgeway v. Darwin.....	[111]
Ray v. Barker.....	175, 176	Ridler v. Ridler.....	217
Read v. Prest.....	186	Rigg v. Wall.....	304
Real and Personal Advance Co.		Rigney v. Fuller.....	[207]
v. McCarthy.....	58, 242	Rio Grande du Sud Steamship ..	72
Reaume v. Leavitt and Reaume		Risca Coal Co., Re.....	331
v. Trowbridge.....	379	Rives v. Rives.....	[174]
Redman v. Brownscombe, 135, 190,	[121]	Robe v. Reid.....	143
Reed v. Barton.....	148	Roberts, Re.....	[113]
Rees v. Watts.....	37	" v. Ball.....	383, [138], [141]
Regina v. Allen.....	62	" Berry.....	51
" Benson.....	346	" Evans.....	202
" Clarke.....	60	" Lucas.....	[126]
" Garland.....	54	" Spicer.....	189
" George Archib'd Amer		" The Corporation of	
and Laban Amer....	65	the City of London..	35
" Howes.....	60	Robertson, Re... 387, 391, [141],	[172]
" Mason.....	[109]	" v. Cooley.....	228
" Smith.....	59	" Grant.....	[141]
" The Parish of St.		" Howard... 130, 235, 257	
Nicholas—without..	54	" Robertson.....	79
Regnault, Re.....	163	" Southgate.....	[123]
Reid v. Langlois.....	282	Robinson, Re.....	330
" Middleton.....	[198]	" v. Chadwick.....	241, 304
Remnant, Re.....	[130]	" Pickering.....	195
" v. Hood.....	162	" Richardson.....	307
Renshaw, Re.....	[162]	" Robinson.....	308, 366
Republic of Bolivia v. Bolivian		" Thompson.....	260
Co..... 245, 296, 325		" Whitcomb.....	[225]
" Costa Rica v. Er-		Robson v. Flight.....	281
langer..... 278, 382		" Whittingham.....	[101]
" Costa Rica v. Strous-		Roche v. Jordan.....	258
berg..... 279, 347		Rodgers v. Manley.....	319
" Liberia v. Imperial		" Manning.....	313
Bank..... 280		" Rodgers..... 186, 307, [187],	
" Liberia v. Roye.....	288	[191], [203], [235], [240].	
Reto v. Welland Railway.....	56	Rodman v. Rodman.....	[103]
Rex v. Barker.....	53, 54	Rodway v. Lucas.....	132
" Bishop of Chester.....	54	Roe v. Davis.....	246, 247, 248
" Bristol Dock Co.....	54	Rogers v. Hunt.....	133
" Dalaval.....	59	Rolfe v. McClaren.....	41, 240
" Greenhill.....	60	Romanes v. Fraser.....	79
" Isly.....	60	" Hern.....	[227]
" Roberts.....	[109]	Rooney v. Rooney.....	322
" Southerton.....	[124]	Rose v. Hickey.....	77, 79
" St. Catharine's Dock Co.	54	Rosebatch v. Barry.....	[264]
" The Severn and Wye Ry.		Ross, Re.....	62
Co..... 54		" v. Gibbs.....	281
" Windham.....	54	" Grant.....	28, 62
Reynolds v. Caswell.....	[126]	" Hayes.....	146
" Coppin.....	[239]	" McLay.....	385
" Godlee.....	281, 283	" Perrault.....	[196], [264]
" Howell.....	142	" Ross.....	[165]
Rhodes v. Jenkins.....	78	" Steele.....	[122], [236]

PAGE.		PAGE.		PAGE.
288	Rotheram v. Priest	175	Scott v. McDonnell	[215]
[107]	Rowby v. Rowby	[103]	" McKeown	[213]
[170]	Rowcliffe v. Leigh	95, 96	" Royal Wax Candle Co.	156, 157
[166]	Rowe v. Wert	79	Scully v. Lord Dundonald	46
346	Rowley, Re	[170]	Seath v. Molloy	74
56	" v. Adams	[174]	Seear v. Lawson	359
[130]	Rowell v. Morris	[238], [260], [306]	Seidler v. Sheppard	184, [207], [221]
350	Royal Canadian Bank v. Dennis	[203], [234]	Senior v. Pawson	[101]
352	" " Mitchell	189, 190, 192, 191	Senn v. Hewitt	274
[171]	Royle, Re, Fryer v. Royle	130, 198	Sergison v. Beavan	148
188	Rudd v. Rowe	[219]	Sessions v. Strachan	350
356	Rudge v. Weedon	[141]	Severn v. Severn	[103], [104]
[111]	Rumbold v. Forteach	280, 281, 288	Sexton Barn's Settled Estate, Re	[119]
217	Rump v. Greenhill	258, [238]	Seymour v. Longworth	283
304	Rumsey v. King	70, 71	" The Corporation of	
[207]	" Read	328	Brecon	352
72	Runnacles v. Mosquita	175	Shardlow v. Cotterill	226
331	Russell, Re	[148], [157], [161]	Sharp v. Lethbridge	361
[174]	" v. East Anglian Ry. Co.	198	" Sharp	217
143	" Robertson	[227]	Sharpe, Re	[141]
[113]	" The Great Anglican		" v. Lamb	291
[138], [141]	Railway Company.	56	Sharpley, Re	[166]
51	Ruston v. Tobin	300	Shaw, Re	[112], [114], [130]
202	Ruttan v. Austin	[134]	" v. Acker	161
[126]	" Smith	251	" Crawford	[234]
189	Rutter v. Chapman	290	" Earl of Jersey	56, 58, 363
ion of	Ryall v. Regina	[126]	" Hardingham	187
ondon.	Ryan, Re	[156]	" Liddell	187
l, [141], [172]	Rycroft v. Christy	189	" Ormiston	143
228			Sheehan v. Great Eastern Rail-	
[141]	S., Re, an attorney	[125]	way Company	202, 204, 205, 259
130, 235, 257	Sadlier v. Smith	250, 251, 274, [190]	Sheffield Water Works Act	391
79	Saffrey, Ex parte, Lambert, in Re	393	Shelford v. The South and East	
[123]	St. Aubyn v. Smart	184	Coast Ry. Co.	131, 175
330	" John v. Rykert	50, 86, 340, [226]	Shelly v. Westbrooke	60
241, 304	" Michael's Coll. v. Merrick	33, 34	Shelley v. Young	194
195	Sale v. Kitson	187	Shelmerdine, Re	[162]
307	" Sale	188	Shephard v. Beane	[206], [218]
308, 366	Salt v. Cooper	335	Shepherd v. Churchill	[156], [160]
260	Sander v. Heathfield	[186]	Sheppard, Re	[165]
[225]	Sanders v. Christie	56	Sherrard, Re	[150]
281	" Horner	[174]	Sherwood v. Campbell	[200], [235]
[101]	Sanderson v. Burdett	[216]	" Sanderson	25, 217, [108]
258	Sandys v. Long	379	Shewan v. Vanderhorst	[186]
319	Saner v. Bilton	42	Shillito v. Collett	62
313	Sargent v. Read	56, 364	Shipman, Re, Wallace v. Ship-	
86, 307, [187],	Sargent v. Gannon	[126]	man	[241], [261], [262]
[235], [240]	Saull v. Browne	288	Shippey v. Gray	351
[103]	Saumarez, Re	[166]	Shipton v. Rawlins	184, 187
132	Saunders v. Jones	276	Shirley v. Earl Ferrers	[185]
246, 247, 248	" Stull	259	Sibson v. Edgworth	262
133	Savage v. Snell	297	Sidden v. Liddiard	[185]
41, 240	Sayer v. Wagstaff	[134]	Silver v. Bishop of Norwich	57
79	Sceptre and Licensed Victuallers'		Simes v. Eyre	187
[227]	Fire Insurance Co., in Re	78	Simmers v. Erb	331, [256]
322	Schackell, Ex parte	[134]	Simmmons v. Lord Kinnaird	[198]
77, 79	Schneider v. Lizardi	262	Simon, Re	[178]
[264]	Schofield, Re	[171]	" v. Le Banque Nationale	382
62	Schomberg v. Zoebelli	235	Simonton v. Graham	[226]
281	Schroder v. Schroder	295, [119]	Simpson, Re	251
28, 62	Scripture v. Gordon	144, 338	" v. Denny	187
146	Scott, Re	62	" Grant	258
385	" v. Black	[237]	" The Ottawa & Pres-	
[196], [264]	Mayor of Liverpool	318	cott Railway Co.	56, [198]
[165]				[199]
[122], [236]				

	PAGE.		PAGE.
Sims v. Ridge .....	[182]	Sovereign v. Sovereign .....	[238]
Sinclair v. Chisholm .....	132	Sparks v. Redhead .....	[218]
Singleton v. Hopkins .....	[150]	Sparrow, Re .....	[162]
Sivewright v. Sivewright .....	273, [190]	Speers v. Great Western Railway Company .....	307
Skelly v. Skelly .....	[216]	Spence v. Hector .....	132
Skiffen v. Davis .....	187	Spencer McDonald, Re .....	[130]
Skinner, Ex parte .....	59	" v. Barough .....	290
" v. Palmer .....	258	Spier v. Bernard .....	[126]
Skip v. Harwood .....	[198]	Spiller, Re .....	[178]
Skitter, Re .....	[151], [153], [155]	" v. Paris Skating Rink Co. (Limited) .....	313
Sladden, Re .....	[134], [135]	Springer v. Clark .....	[241], [261]
Slater v. Fiskien .....	[122], [236]	Sprunt v. Pugh .....	342
" Slater .....	[239], [259]	Sprye v. Reynell .....	244
" Stoddart .....	135	Spurr v. Hall .....	233, 270
Sleight v. Lawson .....	[188]	Stahlschmidt v. Lett .....	[186]
Sloman v. Governor and Govern- ment of New Zealand .....	149	Stain v. Banks .....	[226]
Sloper, Re .....	[166]	Stainton v. Carron Co. ....	[188]
Small v. Union Permanent Build- ing Society .....	46, 230	Standard Bank v. Boulton .....	194
Smallwood v. Rutter .....	188	" McGuaig .....	276
Smart v. Miller .....	349	" Discount Co. v. La Grange .....	75, 176
" The Niagara & Detroit Rivers Railway Co. ....	133	Standing v. Torrance .....	132
Smeeton v. Collier .....	141	Stanford v. Hurlestone .....	55
Smirhwaite, Re .....	[164]	Stansfield v. Hobson .....	187
Smith, Re .....	62, 72, 207, [117], [126], [132], [141], [142], [163]	Stanton & Warren v. McClean ..	[120]
" v. Andrews .....	187	Staples v. Young .....	41, 219
" Barnes .....	283	Star v. Newbury .....	[119]
" Bird .....	290	Starrat v. Manning .....	146
" Boucher .....	[151], [161]	Stracey v. Blake .....	291
" Buller .....	391	Stratford and Huron Railway Co. and the Corporation of the County of Perth .....	52
" Cornfoot .....	379	Steele, Re .....	[126], [134]
" Cowell .....	75	" v. Grossmith .....	56
" Day .....	62, 381, 391	" Stewart .....	281
" Dickinson .....	339	Sterling v. Campbell .....	[212], [224]
" Doyle .....	197	Stephen, Re .....	[134]
" Elliott .....	[221]	" v. Hunter .....	[106]
" Gunn .....	359	Stephens v. Hill .....	[124]
" Haseltine .....	201	Stephenson v. Bane .....	[235]
" Hill .....	151	" Nicholl .....	[182]
" Horsfall .....	357	" Williams .....	128, 138
" Lett .....	172	Stewart, Re .....	251, [159], [175]
" Muirhead .....	165	" v. Fletcher .....	[185], [241], [255]
" Parkside Mining Co. ....	97	" Gladstone .....	313
" Port Hope Harbour Commissioners .....	241	" Hunter .....	186, 187, [193]
" Richardson .....	213	" Stewart .....	379, [204]
" Smith .....	57, 251, [104], [152], [164]	Stimpson v. Stimpson .....	148
" Trust and Loan Com. of Upper Canada .....	350	Stinson v. Taylor .....	244
" Turnbull .....	143	Stirling v. Dubarry .....	376
" Webster .....	[184]	Stock, Ex parte .....	[140]
" Whichcord .....	361	Stockton Iron Furnace, In Re ..	75
" Wilson .....	131, 174	Stokes, Re .....	[163]
Smyth, Re .....	[141], [165], [166]	" v. Trumper .....	[127], [130]
Snow v. Cole .....	128	Stone v. Wishart .....	[197]
Society of Apothecaries v. Not- tingham .....	283	Stovel v. Coles .....	197
Solicitor, .....	346, 366	Strachan v. Devlin .....	[218]
Solomon v. S. Iman .....	318, 396	" Murney .....	[218], [222]
Somerville v. Kerr .....	145, 379	Strauss v. Francis .....	70, 71
Foules v. Soules .....	[104]	Street v. Gover .....	39, 248
South Wales Company, Re .....	[170]	" Hallett .....	[205]
		" O'Reilly .....	[232]
		" The Commercial Bank ..	49

## TABLE OF CASES.

xxxix.

PAGE.	PAGE.	PAGE.
[238]	Strelley v. Pearson..... 363	Teed v. Beere ..... [187]
[218]	Strickland v. Strickland ..... 253	Telford v. Ruskin ..... 282
[162]	Strong v. Moore ..... 192	Tempest, Re ..... [163]
Railway	Strong ..... [141]	Tennant v. Ellis ..... 377
307	Strother, Re ..... [129], [134]	Thibodo v. Collar ..... [218]
132	Stroud v. Gerrard ..... 162	Thistlewaite v. Garnier ..... 295, [119]
[135]	Stuart, Re ..... [111], [170]	Thomas, Re ..... [140], [166], [170]
290	Stubbs v. Boyle ..... 98	" v. Cotton ..... 339
[126]	Molineux ..... [185]	" Cross ..... [126]
[178]	Stupart v. Arrowsmith ..... 202	" Harris ..... 71
ink Co.	Sturgis v. Corp. .... 195	" McCrae ..... [203], [234]
313	Sullivan v. Beavan ..... [240]	" Pearce ..... 148
[241], [261]	" Bridges ..... [126]	" Rawlings ..... 281
342	" Sullivan ..... [241], [261]	" Ruxton ..... [237]
244	Summerfield v. Pritchard ..... 284	" Torrance ..... 186, [199]
233, 270	Superior Savings and Loan Soc'y	" Walker ..... [170]
[186]	v. Lucas ..... 50	" Williams ..... 56
[226]	Sutherland v. Dickson ..... [209]	Thompson's Settled Estates, Re
[188]	" Rogers ..... [185], [190]	[118], [128], [134], [135]
n ..... 194	Swaine v. Great Northern Ry.	Thompson v. Callaghan ..... 381
raig ..... 276	Co ..... [201]	" Dodd ..... 186, 331
v. La	Swallow v. Binns ..... 295	" Dunn ..... 288
75, 176	Swan v. Adams ..... 380	" Freeman ..... [178]
132	" Marmora ..... [231]	" Lewis ..... 306
55	Swansea Shipping Co. v. Duncan	" Macauley ..... [207]
187	" Vale Ry. Co. v. Budd ..... 207, 209	" Marshall ..... 176
Clean ..... [126]	Swanzy v. Swanzy ..... 379, 381	" McCarthy ..... [229]
41, 219	Sweetnam v. Sweetnam ..... [187]	" Tomkins ..... [139]
[119]	" Lemon ..... 351	" Walker ..... [264]
146	Swetnam v. Swetnam. [241], [260], [261]	" Woodvine ..... 41
291	Swift v. Minter ..... [224]	Thoms & Moore, Re ..... [124]
Railway	Swinbank, Ex parte ..... [231]	Thomson v. Walker ..... [195]
n of the	Swinfen v. Swinfen ..... 70, 71	Thorburn v. Brown ..... 277
52	Sworder v. Dear ..... 38	Thorley's Cattle Food Company
[126], [134]	Sykes v. Pickersgill ..... 361	v. Massam ..... 56, 364
56	Sykes v. Brook ..... 95	Thorn v. Seal ..... 176
281	" Hastings ..... [197]	" Smith ..... 152
[212], [224]	" The Brockville & Ottawa	Thornike v. Hunt ..... [125]
[134]	Railway Co ..... 353	Thornhill v. Manning ..... [214]
[106]	Talbot v. Marshfield ..... 281, 284	Thornton, Re ..... [141], [142], [161]
[124]	Tapp v. Jones ..... 350	Thorp v. Jackson ..... 184
[235]	Tarbutt, Re ..... [119]	" Thorp ..... [140], [141]
[182]	Tardrew v. Powell ..... [240]	Thurgood, Re ..... [128]
128, 138	Tarycross v. Drayfus ..... 158	Tice v. Meyers ..... [211], [225]
51, [159], [175]	Tate v. The Corporation of the	Tiel v. Barlow ..... 330
[185], [241],	City of Toronto ..... 351	Tiffany v. Bullen ..... 349
[258]	" Hitchins ..... [126]	" Thompson ..... 48, [260], [261]
313	Tawell v. Slate Co. .... 214	Tilbury v. Brown ..... 351
186, 187, [193]	Taylor, Re ..... [133], [164]	Tildesley v. Harper ..... 202, 247
379, [204]	" v. A. & B. .... [124]	Tillet v. Charing Cross Bridge
148	" Batten ..... 282	Company ..... [101]
244	" Cuthbert ..... [215], [230]	" Stracey ..... 391
376	" Dowlen ..... 71	Tilley v. Thomas ..... 51
[140]	" Eckersley ..... 57, 363	Timpson v. London and N. W.
n Re ..... 75	" Grand Trunk Railway ..... 154	Railway Company ..... 357
[163]	" Hodgson ..... [126]	Toghill v. Grant ..... [130]
[127], [130]	" Jones ..... 368, 393	Tomline v. The Queen ..... 279
[197]	" Meads ..... 190	Tomlinson, Re ..... 62
197	" Rundell ..... 282	Toms, Re ..... [125], [128]
[218]	" Stead ..... [212]	Toronto Gravel Road Company v.
[222]	" Taylor ..... [104]	Taylor ..... 281
[218], [222]	" Walker ..... [200], [208]	Torrance v. Chewett ..... [179]
70, 71	Teague, Re ..... [132]	" Winterbottom ..... [220]
89, 248	Teasdale v. Sanderson ..... [107]	Totten, Re ..... [128], [135]
[205]		" McIntyre ..... 231
[232]		Tournay, Ex parte ..... [141]
Bank. 49		

	PAGE.		PAGE.
Towle, Re .....	[134], [135]	Vardy, Re .....	[133]
Townsend, Re .....	[170]	Varteg Iron Works Chapel, Re ..	318
"    v. Townsend .....	48	Vaughan v. Weldon .....	157
Township of Hamilton v. Stephensson .....	[224]	Vavasseur v. Krupp .....	241
Townsley v. Neil .....	[117]	Velati v. Braham .....	363
Tracey v. Iredale .....	[235]	Ventilation and Sanitary Improvement Co. v. Eccleston .....	242
Trainer v. Hobcombe .....	73	Vernon v. Kinsie .....	56
Travis v. Illingworth .....	[162]	"    Vernon .....	256, 265
Treleaven v. Bray .....	208, 210	Viall, Re .....	[170]
Tremayne, Re .....	[125]	Victoria Mutual Fire Insurance Co. v. Bethune .....	34, 351, 353
Trent v. Hunt .....	50	Vines, Re .....	[129]
Trick, Re .....	[142]	Viney, Re .....	393
Trowell v. Shenton .....	75, 204	"    v. Chaplin .....	330
Trower, Re .....	[141]	Vivian v. Westbrooke .....	[239], [259]
Trowes, Re .....	[140]	Vorley v. Richardson .....	295
Trulock v. Robey .....	[226]		
Truslove v. Whitechurch .....	133	Waddell v. Blockey .....	326
Trust and Loan Company v. Reynolds .....	[207], [227]	"    McColl .....	[194], [214], [228]
Trust and Loan Co. v. Start .....	[237]	"    Smyth .....	[193]
Tucker v. Wilkins .....	[123]	Wadeer v. East India Co .....	280
Tudor v. Morris .....	187	Wagner v. Mason .....	275
Tunstall, Re .....	[163], [164]	Wagstaff v. Smith .....	190
Turbutt, Re .....	[119]	Wake v. Wake .....	[160], [161], [173]
Turner, Ex parte .....	[134]	Wakefield v. Brown .....	391
"    v. Bayley .....	288	Wakelee v. Davis .....	228, 258
"    Burkenshaw .....	281	Waldron v. McWalter .....	380
"    Hednesford Gas Co ..	39	"    Thompson .....	135, 162
"    Heyland .....	377	Walker, Re .....	[124], [148], [149]
"    Jones .....	351, 353	"    v. Balfour .....	205
"    Mollineux .....	[170]	"    Budden .....	304
"    Neill .....	327	"    Easterley .....	378
"    Speakman .....	[156]	"    Fairfield .....	339
"    Turner .....	391	"    Fletcher .....	318
"    Wright .....	48	"    Hicks .....	131, 175
Turney v. Bayley .....	281	"    Niles .....	381
Turquant v. Fearon .....	202, 250	"    Seligman .....	187, [254]
"    Wilson .....	292, 328	Wall v. Wall .....	[119]
Turrill v. Turrill .....	[237]	Wallbridge v. Martin .....	[212]
Twycross v. Grant .....	355, 358	Wallis v. Hepburn .....	265
Tyler v. Bell .....	262	Walsh, Re .....	[134]
"    Hinton .....	[218]	"    Walsh .....	[103]
"    Webb .....	79	Walter v. Jeffries .....	51
Tynn v. Bellingley .....	291	Walton, Re .....	[126]
		Ward, Re .....	[109], [112], [178]
Umphreville v. Johnson .....	202	"    v. Pilley .....	94
Umplebey v. Waveney Valley Railway Co. ....	[123]	"    Swift .....	[199]
Underwood, Re .....	[148], [151]	"    Vance .....	350, 351
Union Bank of London v. Ingram .....	[226], [227]	Warde v. Warde .....	62
United Kingdom Ass. Co., Re ..	[138]	Warburton v. Cioognara .....	[138]
United States v. Commissioners ..	54	Wardell v. Trenouth .....	351
"    Seaman .....	54	Warely v. Poapat .....	143
Upfull, Re .....	[138]	Waring, Re .....	[139], [141]
		Wark v. Moulton .....	140
Val de Travers Co. v. London Tramway Co. ....	201	Warren v. Cotterell .....	197
Vallance v. Birmingham Land Corporation .....	204	"    Love .....	162
Vane v. Lord Barnard .....	48	"    Taylor—Ross v. Taylor ..	[213]
"    Whittington .....	291	Warrender v. Foster .....	[148]
Vansandan v. Rose .....	365	Wartnaby v. Wartnaby .....	217
Vanwinkle v. Chaplin .....	188, 197	Washoe Mining Co. v. Ferguson ..	381
Vardon v. Vardon .....	276	Waterford v. Veale .....	208
		Waters v. Earl of Shaftesbury ..	283
		Waterton v. Croft .....	148
		Watson, Ex parte .....	[114]
		"    v. Brewer .....	166



PAGE.		PAGE.		PAGE.
[133]	pel, Re..	318	Watson v. Hawkins .....	221, 237
157			"    Lane .....	78
241			"    Moore .....	[195], [264]
363			"    Rodwell .....	221, 222, 250
			"    Watson .....	357
242	ary Im-		Watt, Re .....	[162]
66	eten .....		Wattean v. Billam .....	381
256, 265			Watts, Re .....	[152]
[170]			"    v. Barnett .....	149
nsurance			"    Hughes .....	148
34, 351, 353			"    Kelly .....	379
[129]			"    Manning .....	253
393			Waugh, Re .....	[127], [149]
330			"    Waddell .....	[126], [127]
[239], [259]			Wavell, Re .....	[127], [128]
295			"    v. National Provincial	
			Bank of England..	44
326			Wayn v. Lewis .....	[206]
[4], [214], [228]			Weale v. Rice .....	[188]
[193]			Webb, Re .....	[138], [141]
280			"    v. Webb .....	162
275			Webster v. Taylor .....	354
190			Wedderburn v. Pickering .....	135
[0], [161], [173]			Wedmore v. Corporation of Bristol	[101]
391			Weeding, Re .....	[148], [161]
228, 258			Weeks v. Stanton .....	283
380			Weir v. Taylor .....	[219]
135, 162			"    Weir .....	[103]
[4], [148], [149]			Weiss v. Crofts .....	[187], [201], [237]
206			Welchman, Re .....	[134]
304			Weller v. Fitzhugh .....	[142]
378			Wellesley v. Wellesley .....	262, 263
339			Wells, Re .....	[130], [133], [135]
318			"    v. Maxwell .....	51
131, 175			Welply v. Buhl .....	395
381			Welsh v. Silwell .....	[126]
187, [254]			Wesley v. Jones .....	148
[119]			Westacott v. Cockerline .....	[237], [251]
[212]			Westbrooke v. Browett .....	24
265			Western Assurance Co. v. Capreol	[215]
[134]			Western Canada Loan and Sav-	
[103]			ings Co. v. Court .....	138
51			Western Canada Loan and Sav-	
[126]			ings Co. v. Ince .....	58
[9], [112], [178]			Western Canada Oil Co., Re. 273, [190]	
94			"    "    v. Walker .....	280, 281
[199]			Western Insurance Co .....	145
350, 351			Westhead v. Sale .....	[170]
62			Westman v. Aktiebolaget Ekman	156
[138]			Weston v. Tiler .....	[160]
351			Westwood, Re .....	[174]
143			Whalley, Re .....	[130]
[139], [141]			"    v. Williamson .....	[130]
140			Wharton v. Cradock .....	[214]
197			Wheatley v. Bastow, Re Collins.	[125]
162			Wheeler, Re .....	[140], [165], [170]
v. Taylor [213]			Whetstone v. Dewis .....	214
[148]			Whistler v. Hancock .....	264, 265, 395
217			Whitaker v. Forbes .....	157
erguson.			Whitby, Ex parte .....	[166]
208			White, Re .....	[158]
283			"    v. Cochlin .....	172
148			"    Courtney .....	[195], [264]
[114]			"    Cummings .....	[241], [261]
166			"    Greathead .....	379
			"    White .....	379, [104]
			White v. Witt .....	75
			Whitehead v. North .....	[182]
			Whitelaw v. National Insurance	
			Co. ....	307
			Whitely v. Honeywell .....	149
			Whitfield v. Roberts .....	[214]
			Whitling, Re .....	[140]
			Whitton, Re .....	[142]
			Wilcox v. Pillow .....	51
			Wilde v. Wilde .....	242
			Wilding v. Bolder .....	[163]
			Wilkins v. Bedford .....	41
			"    Reeves .....	187
			Wilkinson, Re .....	[161], [163]
			Wilks v. Groom .....	[151]
			Williams, Re. [122], [132], [139],	[178]
			"    v. Andrews .....	202
			"    Bailey .....	[103]
			"    Bryant .....	162
			"    Clough .....	397
			"    Corby .....	157, 315
			"    Griffiths .....	[126]
			"    Page .....	202
			"    Prince of Wales As-	
			surance Co. ....	283, 284
			"    Salmond .....	198, 201
			"    Snowden .....	44
			"    Williams .....	162, 312, [118]
			"    Wright .....	41
			Williamson v. London and North	
			Western Ry. Co. ....	243, 250
			Wilson v. Aetna Life Ass. Co. ....	154
			"    Baird .....	291
			"    Bennett .....	295, [120]
			"    Brunskill .....	281
			"    Church .....	202, 203, 278
			"    Dundas and Stephenson	347,
			350	
			"    Goodman .....	184
			"    Proudfoot .....	[178]
			"    Whately .....	295, [119]
			"    Wilson .....	56, 381, [102],
			[103], [104]	
			Wiman v. Bradstreet .....	283
			Wimburst, Hollick & Co. v. The	
			Barrow Ship Building Co. ....	377
			Wingrove v. Thompson .....	355
			Winnett v. Renwick .....	78, 79
			Winterbotham, Re .....	[128]
			Winterringham, Re .....	166
			Winters v. Kingston Permanent	
			Building Society .....	339
			Winthrop v. Murray .....	251
			Wintle v. Williams .....	352
			Wiscott's Case .....	49
			Wise, Re .....	[148]
			"    v. Birkinshaw .....	352
			Wiseman, Re .....	[171]
			Witham v. Vane .....	206, 210
			Withington v. Withington .....	[162]
			Witt v. Corcoran .....	72
			Wolley v. Thomas .....	141
			Wolverhampton and Staffordshire	
			Banking Co. v. Bond .....	148
			Wood, Re .....	71, [166]
			"    v. Barnicot .....	96



	PAGE.		PAGE.
Wood v. Beetlestone.....	[160], [167]	Wright v. Swindon, Marlboro', and Andover Rail- way Company....	266, 357
“ Boucher.....	383	“ Way.....	147
“ Lambirth.....	[194]	“ Wilkin.....	273, [190]
“ McAlpine.....	51	“ Woodham.....	[119]
“ Wood.....	[107]	“ Wright.....	[225]
Woodbridge v. Norris.....	197	Wyatt v. Sadler.....	[182]
Woodburn, Re.....	[141], [171]	Wye Valley R'y Co. v. Hawes....	208, 209
Woodfall v. Arbuthnot.....	[165]	Wylde, Re.....	[166]
Woodgate, Re.....	[162]	Wyllie v. Ellice.....	[379]
Woodhatch v. Francis.....	311, [239]	Wyllie, Re.....	[141]
Woodman v. Blair.....	273	Wynne v. Dodds.....	204
Woodroffe v. Titterton.....	[183]	Wynne v. Humberstone.....	279, 281
Woods v. Woods.....	219	“ Lord Newburgh.....	[199]
Woodside v. Toronto St. Railway Company.....	156	Yaggie, Re.....	[204], [229]
Woodstock v. Niagara.....	246	Yeoman v. Haynes.....	[187]
Woodvine, Re.....	41	Yetts, Re.....	[127]
Woollet, Re.....	[130]	“ v. Foster.....	321
Worley v. Glover.....	148	York and Midland Railway Co. v. Hudson.....	236
Wormsley v. Sturt.....	[189]	Yorkshire Banking Co. (Limited) v. Beatson & Wycok.....	177
Worraker v. Pryer.....	198	Yorkshire Wagon Company v. Newport Coal Co.....	206, 208, 209
Worth v. McKenzie.....	152	Young, Re.....	[140]
Worthington v. Boulton.....	129, 132, 134, 138	“ v. Brassey.....	157, 318
Wortley, Re, Culley & Wortley.....	203	“ Crompton.....	133
Wragg, Ex parte.....	[109]	“ Kitchell.....	38, 219
Wright, Re.....	[139], [140], [141]	“ Ward.....	187
“ v. Angle.....	165		
“ Clifford.....	305		
“ Garden.....	191		
“ Morgan.....	168, [223]		
“ Redgrave.....	46		
“ Smith.....	291		

PAGE.	
rlboro',	
r Rail-	
ay....	266, 357
.....	147
.....273,	[190]
.....	[119]
.....	[225]
.....	[182]
wes., 208,	209
nd Lon-	
Co...	69
.....	[166]
.....	[379]
.....	[141]
.....	204
.....279,	281
h.....	[199]
.....[204],	[229]
.....	[187]
.....	[127]
.....	321
ay Co.	236
imited)	177
pany v.	
.....206, 208,	209
.....	[140]
.....157,	318
.....	133
.....38,	219
.....	187

## TIME TABLE,

*Shewing the periods, within which, the various proceedings are to be taken.*

### AFFIDAVITS, EVIDENCE BY :—

PLAINTIFF to deliver list of affidavits within 14 days after consent .....	Ord. XXXIV., r. 1
DEFENDANT to deliver list of affidavits within 14 days after receiving plaintiff's list ....	" 2
PLAINTIFF to deliver list of affidavits in reply within 7 days after expiration of said 14 days.....	" 3
DEPONENTS to be produced at trial, if notice served before expiration of 14 days, next after end of time allowed for affidavits in reply .....	" 4

### AMENDMENT :—

BY PLAINTIFF once without leave any time before reply and before expiration of time for replying .....	Ord. XXIII., r. 2
If no defence delivered then before expiration of 4 weeks from last appearance .....	" 2
BY DEFENDANT without leave, where set-off or counter-claim, before pleading to reply and before expiration of time for such pleading	" 3
If no reply then within 28 days from filing of defence .....	" 3
AFTER ANY AMENDMENTS opposite party may, within 8 days after delivery thereof, move to disallow .....	" 4
Or may without leave within 4 days amend his former pleading .....	" 5

Amendments must be made within 14 days from date of order unless otherwise provided .....

Ord. XXIII., r. 8

# APPEAL COURT OF, SITTINGS:—

Five sittings in each year, commencing :

2nd Tuesday in January.

1st " March.

2nd " May.

1st " September.

2nd " November.....

" 53

# APPEALS FROM HIGH COURT:—

NOTICE to be given to Clerk of Crown or Registrar of Court within 1 month, and proper security to be given within 3 months after judgment complained of .....

Jud. Act, sec. 38

BOND to be deemed perfected unless moved against within 14 days after notice of deposit served .....

App., Ord. 7

DRAFT CASE, respondent to return within 4 days .....

" 9

NOTICE TO SETTLE case if parties differ, 2 days' notice .....

" 9

REASONS OF APPEAL, appellant shall deliver with draft case .....

" 11

Respondent shall serve reasons within 10 days after such service .....

" 11

PRINTED CASE to be delivered to Registrar within 30 days after allowance of security .....

" 21

ENTRY FOR ARGUMENT at next regular sittings, which shall commence at least 8 days after deposit of case .....

" 22

MOTIONS, 2 clear days' notice .....

" 26

SETTLING CERTIFICATE, 2 clear days' notice....

" 31

# APPEALS FROM COUNTY COURT:—

ENTRY FOR ARGUMENT at first sittings, which shall commence after the expiration of 30 days from decision, complained of.....

" 40

# TIME TABLE.

xl.

Certified copy pleadings and 10 appeal books to be delivered to Registrar at least 8 days before sittings .....	App., Ord. 41
NOTICE OF SETTING DOWN and copy of book to be served at least 6 days' before the sittings...	" 48
MOTIONS to allow appeals where rules not complied with, 2 days' notice.....	" 50

## APPEAL COURT RULES :—

LONG VACATION commences 1st July, terminates 31st August ; Christmas vacation commences 24th December, terminates 2nd January. First and last days both included	" 56
TIME OF VACATION not counted in time for any Act, except in County Court Appeals....	" 57
COURT OR JUDGE has power to enlarge or abridge times.....	" 58
WHERE DAYS NOT STATED TO BE CLEAR DAYS, exclude first and include last.....	" 59
IF EXPRESSED TO BE CLEAR DAYS, both days to be excluded.....	" 60

## APPEALS FROM CHAMBERS :—

WITHIN 8 days after decision. If no Court within that period, then on first day on which Court sits .....	Ord. XLVIII., r. 3
FROM COUNTY JUDGE, MASTER IN CHAMBERS, LOCAL MASTER, with 8 days after decision.	Ord. XLIX., r. 13 (c)
Notice must be served within 4 days.....	" (b)

## APPEARANCE :—

WITHIN JURISDICTION, 10 days after service..	Ord. II., r. 5
WITHOUT JURISDICTION, see .....	Ord. VII., r. 2
BY THIRD PARTY, 8 days after service.....	Ord. XII., r. 22
BY DEFENDANT TO COUNTER-CLAIM, same period as defendant in writ of summons.....	Ord. XVIII., r. 7
EJECTMENT, where defence limited, notice to be served within 4 days after appearance..	Ord. VIII., r. 17
WHERE DEFENCE LIMITED to question of amount only, notice to be served within 4 days after appearance .....	Ord. VIII., r. 19

**AWARD :—**

JUDGMENT may be signed upon, } after expira-  
 tion of 14 days after service of a copy of  
 award ..... Ord. XXIX., r. 3 (e)

**COMMISSION :—**

INTERROGATORIES to be delivered at least 8 days  
 before issue of commission ..... Ord. XXXII., r. 5  
 CROSS-INTERROGATORIES to be delivered within  
 4 days after receipt of interrogatories in  
 chief ..... " 5  
 NOTICE OF EXECUTION of commission, 48 hours ..... " 7  
 IF ANY COMMISSIONER REFUSES to act upon re-  
 ceiving 48 hours' notice, commission may  
 be executed by the commissioner giving the  
 notice ..... " 13

**COUNTY COURT :—**

SITTINGS to commence on first Tuesday instead  
 of Monday in April and October ..... Ord. LX., r. 2  
 (See "Appeal.")

**COUNTER-CLAIM :—**

MOTION TO EXCLUDE, within 3 weeks from de-  
 livery ..... Ord. XIX., r. 9

**DEFENCE :—**

LIMITING to question of amount only by notice  
 served within 4 days after appearance .... Ord. VIII., r. 19  
 (See "Statement of Defence.")

**DEMURRER :—**

ENTRY FOR ARGUMENT and notice given (same  
 day) within 10 days after delivery ..... Ord. XXIV., r. 7, 7(a)

**EJECTMENT :—**

LIMITING DEFENCE, notice to be served within  
 4 days after appearance ..... Ord. VII., r. 17

**EXAMINATION OF JUDGMENT DEBTOR :—**

APPOINTMENT to be served 48 hours before time  
 appointed ..... Ord. XLI., r. 4

**EXECUTION :—**

IN CASE OF NON-APPEARANCE at expiration of  
8 days from last day for appearance..... Ord. IX., r. 4  
MAY BE ISSUED at any time within 6 years from  
the recovery of judgment ..... Ord. XXXVIII., r. 17

**INFANT :—**

IF NO GUARDIAN appointed within 7 days after  
time for appearance, plaintiff may serve  
official guardian..... Ord. IX., r. 2

**INSPECTION :—**

PARTY RECEIVING NOTICE to produce, shall with-  
in 2 days, or in certain case 4 days, serve  
notice of time for inspection, which must  
be within 3 days ..... Ord. XXVII., r. 14

**JUDGMENT :—**

NON-APPEARANCE, writ not specially indorsed,  
but demand liquidated, 8 days after state-  
ment of claim..... Ord. IX., 6  
APPLICATION FOR LEAVE TO ENTER, 2 clear days'  
notice..... Ord. X., r. 2

**MOTION FOR JUDGMENT :—**

AFTER TRIAL OF ISSUES of fact, if plaintiff do not  
set down within 10 days after his right to  
do so has arisen, defendant may set down. Ord. XXXVI., r. 4  
No MOTION can be set down after lapse of one  
year from time when right to set down first  
accrued ..... " 6

**MOTIONS :—**

NOTICE must be 2 clear days ..... Ord. XLVII., r. 4

**NEW TRIAL :—**

ORDER TO SHEW CAUSE RETURNABLE at expira-  
tion of 8 days from date of order .... Ord. XXXV., r. 2  
And to be served within 4 days from time  
when made..... " 4  
MOTION FOR, within first 4 days of sittings of  
Division Court ..... " 3

<i>In case judgment reserved and given during sittings, then within 10 days after decision, if so many days expire in such sittings; if not, then, within first 4 days of ensuing sittings .....</i>	Ord. XXXV., r. 3 (a)
<i>In case of trial during sittings, then within 6 days after verdict, if so many days expire during sittings; if not, then, within first 4 days of ensuing sittings</i>	" 3 (b)

ORDER ON CHANGE OF PARTIES :—

APPLICATION TO DISCHARGE, or vary, order must be within 12 days from service .....	Ord. XLIV., r. 5
IN CASE OF PERSON UNDER DISABILITY within 12 days from appointment of guardian....	" 7
IF PARTY SERVED OUT OF JURISDICTION, then within same time as a defendant has to appear to a writ of summons .....	" 8

PAYMENT INTO COURT :—

PLAINTIFF may within 4 days after receiving notice of payment into Court, or if payment first stated in defence, before reply, accept same in satisfaction.....	Ord. XXVI., r. 4
---	------------------

PLEADINGS :—

DEFENCE TO SET-OFF OR COUNTER-CLAIM arising after action, may be pleaded by plaintiff within 3 weeks after defence or last of defences delivered.....	Ord. XVI., r. 2
IF MATTER ARISES AFTER 3 WEEKS may be pleaded within 8 days after it arises.....	" 4
DEFENCE ARISING AFTER DELIVERY OF DEFENCE, defendant may, within 8 days after it arises, deliver a further defence. (See Statement of Claim; Statement of Defence).....	" 3

PLEADINGS :—

SUBSEQUENT TO REPLY to be delivered within 4 days after delivery of previous pleading..	Ord. XX., r. 3
---	----------------

# TIME TABLE.

xlix.

## PRODUCTION :—

ORDER may be obtained directing adverse party to produce within 10 days after service....

XXVII., r. 4

## REPLY :—

TO BE DELIVERED within 3 weeks after defence, or last of defences, delivered.....

Ord. XX., r. 1

TO COUNTER-CLAIM—same periods as for Statement of Defence .....

Ord. XVIII., r. 8

## SECURITY FOR COSTS :—

TIME limited by order, 4 weeks.....

Ord. L., r. 4

## SERVICE—(See "Appearance.")

## SITTINGS OF HIGH COURT :—

MICHAELMAS.—Third Monday in November to Saturday of second week thereafter .....

HILARY.—First Monday in February to Saturday of following week.....

EASTER.—Third Monday in May to Saturday of second week thereafter .....

Ord. LVII., r. 1 (a)

## STATEMENT OF CLAIM :—

TO BE DELIVERED within three months after appearance.....

Ord. XVII., r. 1

Where defendant added by amendment, to be delivered with writ of summons or notice, or within 4 days after appearance .....

Ord. XII., r. 18

## STATEMENT OF DEFENCE :—

TO BE DELIVERED within 8 days from delivery of statement of claim .....

Ord. XVIII., r. 1

IF NO STATEMENT of claim, then within 8 days after appearance .....

" 2

IF AFTER ORDER FOR TIME, then within 8 days after order.....

" 3

## TRIAL :—

USUAL NOTICE OF TRIAL, 10 days .....

Ord. XXXI., r. 6

SHORT " 5 " .....

" 6



ENTRY FOR TRIAL, not later than third day next  
before first day of Assizes or Sittings .... Ord. XXXI., r. 11

WRIT OF SUMMONS:—

IN FORCE FOR 12 MONTHS from date ..... Ord. V., r. 1

INDORSEMENT OF SERVICE must be within 3 days  
after service ..... Ord. VI., r. 12

GENERAL PROVISIONS UNDER ORDER LII.

- Rule 1.—*Months* means calendar months, unless otherwise expressed.
- “ 2.—In computing periods less than 6 days, holidays are not reckoned.
- “ 3.—In computation of days, exclude first day and include the last, except where the term “clear days” used.
- “ 4.—If last day falls on a Sunday, or other day on which offices are closed, performance of act upon next day on which offices are open is sufficient.
- “ 5.—Services must be effected before 6 p.m., (on Saturdays before 2 p.m.) Service after that hour counts as service on next day (or Monday).
- “ 6.—Pleadings not to be delivered or amended during long vacation.
- “ 7.—Long vacation not computed in time for:—
- (1) Filing, delivering or amending pleadings.
  - (2) Filing statements of defence to original or amended claim.
  - (3) Amending or obtaining orders for leave to amend.
  - (4) Setting down demurrers.
  - (5) Filing replications or setting down causes under G. O. Chy. 152-155.
  - (6) Master's reports becoming absolute.
  - (7) Moving to discharge an order on change of parties by death, etc.
  - (8) Moving to add to, vary, or set aside a decree by any party served therewith.
  - (9) Or for the proceedings substituted by the Act or Rules for any of the proceedings, 2-8.
- “ 8.—The Court or a Judge may enlarge or abridge any such periods.

# TABLE

## SHEWING THE SOURCES FROM WHICH THE ONTARIO JUDICATURE ACT HAS BEEN COMPILED.

The references in the right hand column to the Ontario Act and Orders are distinguished by the use of Arabic numerals only, when the reference is to the Act; and of Roman numerals (sometimes followed by Arabic) when the Orders are referred to. For example, "sec. 67, s.-s. 3," means section 67 of the Act, sub-section 3; and "Order XXXVIII., Rule 3," means Order 38, Rule 3.

### IMPERIAL STATUTES.

### ONTARIO ACT AND ORDERS.

15 and 16 Vic., cap. 76 (Com. Law Pro.  
Act, 1852).

Sec. 7.....	
" 13.....	
" 15.....	
" 17.....	
" 19.....	
" 27.....	
" 28.....	
" 29.....	
" 33.....	
" 40.....	
" 41.....	
" 53.....	
" 63.....	
" 68.....	
" 69.....	
" 94.....	
" 172.....	
" 177.....	
" 222.....	

15 and 16 Vic., cap. 86.

Sec. 45 and 47.....	
" 42.....	
" 42.....	
" 52.....	

17 and 18 Vic., cap. 125 (Com. Law Pro.  
Act, 1854), sec. 96.....

" 257.....

22 and 23 Vic., cap. 12, sec. 2.....

23 and 24 Vic., cap. 126 (Com. Law Pro.

Act, 1860), Sec. 36.....

31 and 32 Vic., cap. 72.....

36 and 37 Vic., cap. 66 (Judicature Act,  
1873).

Sec. 2.....

" 3.....

Order IV., Rule 1 (b).

Order V., Rule 2.

Order VI., Rule 12 (a).

" " 2.

Order II., Rule 4.

Order IX., Rule 4.

" " 6.

" " 7.

" " 5.

Order XIII., Rule 4.

" " 1, 8.

Order XVI., Rule 2.

Order XVIII., Rule 1.

Order XVI., Rule 3.

" " 3.

Order IX., Rule 7.

Order VIII., Rule 14.

Order IX., Rule 8.

Order XXIII., Rule 2.

Order XI., Rule 1.

Order XII., Rule 7.

" " 14.

Order XLIV., Rule 3.

Order XXIII., Rule 2.

Order IX., Rule 9.

Sec. 90, s.-s. 1.

Order XXIII., Rule 2.

Sec. 5.

Sec. 2.

" 3.

## IMPERIAL STATUTES.

36 and 37 Vic., cap. 66 (Judicature Act, 1873).

Sec. 4.	.....
" 5.	.....
" 9.	.....
" 11.	.....
" 12.	.....
" 16.	.....
" 18.	.....
" 19.	.....
" 22.	.....
" 23.	.....
" 24.	.....
" 24, s.-s. 1.	.....
" 24, " 2.	.....
" 24, " 3.	.....
" 24, " 4.	.....
" 24, " 5.	.....
" 24, " 6.	.....
" 24, " 7.	.....
" 25.	.....
" 25, s.-s. 2.	.....
" 25, " 3.	.....
" 25, " 4.	.....
" 25, " 5.	.....
" 25, " 6.	.....
" 25, " 7.	.....
" 25, " 8.	.....
" 25, " 10.	.....
" 25, " 11.	.....
" 26.	.....
" 27.	.....
" 28.	.....
" 29.	.....
" 31.	.....
" 33.	.....
" 34.	.....
" 36.	.....
" 38.	.....
" 39.	.....
" 40.	.....
" 41.	.....
" 42.	.....
" 45.	.....
" 46.	.....
" 49.	.....
" 50.	.....
" 51.	.....
" 52.	.....
" 56.	.....
" 57.	.....
" 58.	.....
" 59.	.....
" 61.	.....
" 64.	.....
" 73.	.....
" 75.	.....
" 76.	.....
" 77.	.....
" 83.	.....
" 87.	.....
" 89.	.....
" 90.	.....

## ONTARIO ACT AND ORDERS.

Sec. 3, s.-s. 2.	.....
" 3, s.-s. 4, 5, 7.	.....
" 5.	.....
" 6.	.....
" 7; 7, s.-s. 2.	.....
" 9; 9, s.-s. 2.	.....
" 13, 37.	.....
" 13, 14, 15, 37.	.....
" 10, 11; 11, s.-s. 2, 3.	.....
" 12.	.....
" 16.	.....
" 16, s.-s. 2.	.....
" " 3.	.....
" " 4.	.....
" " 5.	.....
" " 6.	.....
" " 7.	.....
" " 8.	.....
" 17.	.....
" 17, s.-s. 2.	.....
" " 3.	.....
" " 4.	.....
" " 5.	.....
" " 6.	.....
" " 7.	.....
" " 8.	.....
" " 9.	.....
" " 10.	.....
" 18, 19.	.....
" 20.	.....
" 21.	.....
" 22.	.....
" 3, s.-s. 3, 6, 8.	.....
" 23.	.....
" 24.	.....
" 26.	.....
" 27.	.....
" 28, s.-s. 3.	.....
" 29, s.-s. 6.	.....
" 30; 31, s.-s. (b).	.....
" 23.	.....
" 33, 34.	.....
" 28, s.-s. 2.	.....
" 32.	.....
" 36, 37.	.....
" 40.	.....
" 41.	.....
" 47; 47, s.-s. 2.	.....
" 48; 48, s.-s. 2; 63.	.....
" 49.	.....
" 50.	.....
" 8, 51.	.....
Order VIII., Rule 1.	.....
Sec. 52.	.....
" 56.	.....
" 57.	.....
" 58, s.-s. 5; 59.	.....
" 73.	.....
" 63; 63, s.-s. 2.	.....
" 74, s.-s. 3.	.....
" 77.	.....
" 78.	.....

## IMPERIAL STATUTES.

ENGLISH ORDERS AND RULES.

CON. ORDERS CHANCERY.

RULES SUPREME COURT, 1875.

ONTARIO ACT AND ORDERS.

Sec. 4.  
 " 3, s.-s. 6; sec. 5.  
 " 3, s.-s. 7.  
 " 25, s.-s. 2.  
 " 35, 42, s.-s. 2.  
 " 53.  
 " 54, s.-s. (d), s.-s. 4.  
 " 87.  
 " 52, 87.  
 " 28, s.-s. 2.  
 " 54, s.-s. 6, 7.  
 " 90, s.-s. 2.  
 " 91 (b).  
 " 28; 28, s.-s. 2; 29, s.-s. 6; 44, 55.

**Sec. 3, s.-s. 3.**

Sec. 58, s.-s. 3.  
" 58, s.-s. 4.

Order VIII., Rule 11.  
Order LII., Rule 3.

**Order VI., Rule 2.**

Order I., Rule 1.  
 " " 2.  
 " " 4.  
 Order II., Rule 1.  
 " " 2.  
 " " 3.  
 Order VII.  
 Order II., Rule 4.  
 " 5.  
 Order III., Rule 5.  
 " 6.  
 Order III., Rule 8 (a).  
 " " 9 (b).  
 Order III., Rule 10.  
 " " 12.  
 " " 11.  
 " " 13.  
 " " 14.  
 " " 15.  
 " " 16.  
 Order III., Rule 17.

## RULES SUPREME COURT, 1875.

## ONTARIO ACT AND ORDERS.

Order VI., Rule 2 .....	Order III., Rule 18.
Order VII., Rule 1 .....	Order IV., Rule 1 (b).
“ “ 2 .....	“ “ 2 (b).
Order VIII., Rule 1 .....	Order V., Rule 1 (c).
“ “ 2 .....	“ “ 2.
Order IX., Rule 1 .....	Order VI., Rule 1.
“ “ 2 .....	“ “ 2.
“ “ 4 .....	“ “ 4 (c.)
“ “ 4 .....	“ “ 5.
“ “ 5 .....	“ “ 6.
“ “ 6 .....	“ “ 8.
“ “ 7 .....	“ “ 10.
“ “ 8 .....	“ “ 11.
“ “ 13 .....	“ “ 12 (a.)
Order X. ....	Order VI., Rule 2.
Order XI. ....	Order VII.
Order XII., Rule 1 .....	Order VII., Rule 1 (c).
Order XII., Rule 1-5 .....	Order VIII., Rule 1.
“ “ 5 .....	“ “ 2.
“ “ 7 .....	“ “ 3.
“ “ 8 .....	“ “ 4.
“ “ 9 .....	“ “ 5.
“ “ 10 .....	“ “ 6.
“ “ 11 .....	“ “ 7.
“ “ 12 .....	“ “ 8.
“ “ 13 .....	“ “ 10.
“ “ 14 .....	“ “ 11.
“ “ 15 .....	“ “ 12.
“ “ 18 .....	“ “ 14.
“ “ 19 .....	“ “ 15.
“ “ 20 .....	“ “ 16.
“ “ 21 .....	“ “ 17.
“ “ 22 .....	“ “ 18.
Order XIII., Rule 1 .....	Order IX., Rule 1 (a).
“ “ 2 .....	“ “ 3.
“ “ 3 .....	“ “ 4.
“ “ 4 .....	“ “ 5.
“ “ 5 .....	“ “ 6.
“ “ 6 .....	“ “ 7.
“ “ 7 .....	“ “ 8.
“ “ 8 .....	“ “ 9.
Order XIV., Rule 1 .....	Order X., Rule 1.
“ “ 2 .....	“ “ 2.
“ “ 3 .....	“ “ 3.
“ “ 4 .....	“ “ 4.
“ “ 5 .....	“ “ 5.
“ “ 6 .....	“ “ 6.
Order XV., Rule 1 .....	Order XI., Rule 1.
“ “ 2 .....	“ “ 2.
Order XVI., Rule 1 .....	Order XII., Rule 1.
“ “ 2 .....	“ “ 2.
“ “ 3 .....	“ “ 3.
“ “ 4 .....	“ “ 4.
“ “ 5 .....	“ “ 5.
“ “ 6 .....	“ “ 6.
“ “ 7 .....	“ “ 7.
“ “ 8 .....	“ “ 9.
“ “ 9 .....	“ “ 10.
“ “ 10 .....	“ “ 12.
“ “ 11 .....	“ “ 14.
“ “ 13 .....	“ “ 15.
“ “ 14 .....	“ “ 16.
“ “ 15 .....	“ “ 17.
“ “ 16 .....	“ “ 18.

## RULES SUPREME COURT, 1875.

Order XVI., Rule 17.....	17
“ “ 18.....	18
“ “ 19.....	19
“ “ 20.....	20
“ “ 21.....	21
Order XVII., Rule 1.....	1
“ “ 2.....	2
“ “ 3.....	3
“ “ 4.....	4
“ “ 5.....	5
“ “ 6.....	6
“ “ 7.....	7
“ “ 8.....	8
“ “ 9.....	9
Order XVIII., Rule 1.....	1
Order XIX., Rule 1.....	1
“ “ 2.....	2
“ “ 2.....	2
“ “ 2.....	2
“ “ 2.....	2
“ “ 3.....	3
“ “ 3.....	3
“ “ 3.....	3
“ “ 4.....	4
“ “ 5.....	5
“ “ 5.....	5
“ “ 6.....	6
“ “ 7.....	7
“ “ 8.....	8
“ “ 9.....	9
“ “ 24.....	24
“ “ 25.....	25
“ “ 26.....	26
“ “ 27.....	27
“ “ 28.....	28
“ “ 29.....	29
“ “ 23.....	23
“ “ 13.....	13
“ “ 14.....	14
“ “ 15.....	15
“ “ 16.....	16
“ “ 18.....	18
“ “ 21.....	21
“ “ 19.....	19
Order XX., Rule 1.....	1
“ “ 12.....	12
“ “ 2.....	2
“ “ 2.....	2
“ “ 3.....	3
“ “ 4.....	4
Order XXI., Rule 1.....	1
“ “ 1 (b).....	1 (b)
“ “ 1 (c).....	1 (c)
“ “ 4.....	4
Order XXII., Rule 1.....	1
“ “ 2.....	2
“ “ 3.....	3
“ “ 4.....	4
“ “ 5.....	5
“ “ 6.....	6
“ “ 7.....	7
“ “ 8.....	8
“ “ 9.....	9
“ “ 10.....	10

## ONTARIO ACT AND ORDERS.

Order XII., Rule 19.....	19
“ “ 20 (c).....	20 (c)
“ “ 21.....	21
“ “ 22.....	22
“ “ 23 (a).....	23 (a)
Order XIII., Rule 1.....	1
“ “ 2.....	2
“ “ 3.....	3
“ “ 4.....	4
“ “ 5.....	5
“ “ 6.....	6
“ “ 7.....	7
“ “ 8.....	8
“ “ 9.....	9
Order XIV., Rule 1.....	1
Order XV., Rule 1.....	1
“ “ 2.....	2
“ “ 2 (a).....	2 (a)
“ “ 2 (b).....	2 (b)
“ “ 2 (c).....	2 (c)
“ “ 3.....	3
“ “ 3 (a).....	3 (a)
“ “ 3 (b).....	3 (b)
“ “ 4.....	4
“ “ 5.....	5
“ “ 6.....	6
“ “ 7.....	7
“ “ 8.....	8
“ “ 9.....	9
“ “ 10.....	10
“ “ 11.....	11
“ “ 12.....	12
“ “ 13.....	13
“ “ 14.....	14
“ “ 15.....	15
“ “ 16.....	16
“ “ 17.....	17
“ “ 18.....	18
“ “ 19.....	19
“ “ 20.....	20
“ “ 21.....	21
“ “ 23.....	23
“ “ 24.....	24
“ “ 25.....	25
Order XVI., Rule 1.....	1
“ “ 2.....	2
“ “ 3.....	3
“ “ 4.....	4
“ “ 7.....	7
XXIV., “ 4.....	4
Order XVII., Rule 1 (a).....	1 (a)
“ “ 1 (c).....	1 (c)
“ “ 1 (d).....	1 (d)
“ “ 2 (b).....	2 (b)
Order XVIII., Rule 1.....	1
“ “ 2.....	2
“ “ 3.....	3
“ “ 4.....	4
“ “ 5.....	5
“ “ 6.....	6
“ “ 7.....	7
“ “ 8.....	8
“ “ 9.....	9
“ “ 10.....	10

O. XXIV., - 3.

RULES SUPREME COURT, 1875.	ONTARIO ACT AND ORDERS.
Order XXIII., Rule 1.....	Order XIX., Rule 1 (c).
Order XXIV., Rule 1. O. XVI., R. 2.	Order XX., Rule 1. O. XXIII—2.
" " 2.....	" " 2.
" " 3.....	" " 3. O. XXIII—5.
Order XXV.....	O. XXI.; O. XXIII., R. 2.
Order XXVI.....	Order XXII.
Order XXVII., Rule 1.....	Order XXIII., Rule 1.
" " 2.....	" " 2.
" " 3.....	" " 3.
" " 4.....	" " 4.
" " 5. O. XVI., R. 6.	" " 5.
" " 6. O. XVI., R. 6.	" " 7.
" " 7.....	" " 8.
" " 8.....	" " 9.
" " 9.....	" " 10.
" " 10.....	" " 11.
Order XXVIII., Rule 1.....	Order XXIV., Rule 1.
" " 2.....	" " 2.
" " 5.....	" " 6.
" " 6.....	" " 7 (a).
" " 7.....	" " 8.
" " 8.....	" " 9.
" " 9.....	" " 10.
" " 10.....	" " 11.
" " 11.....	" " 12.
" " 12.....	" " 13.
" " 13.....	" " 14.
Order XXIX., Rule 1.....	Order XXV., Rule 1.
" " 2.....	" " 2.
" " 3.....	" " 3.
" " 4.....	" " 4.
" " 5.....	" " 5.
" " 6.....	" " 6.
" " 7.....	" " 7.
" " 8.....	" " 8.
" " 10.....	" " 9.
" " 11.....	" " 10.
" " 12.....	Order XXI.
" " 13.....	Order XXV., Rule 11.
" " 14.....	" " 12.
Order XXX., Rule 1.....	Order XXVI., Rule 1.
" " 2.....	" " 2.
" " 3.....	" " 3.
" " 4.....	" " 4.
Order XXXI., Rule 2.....	Order XXVII., Rule 2.
" " 11.....	" " 3.
" " 12.....	" " 4.
" " 13.....	" " 10.
" " 14.....	" " 11.
" " 15.....	" " 13.
" " 16.....	" " 14.
" " 17.....	" " 15.
" " 18.....	" " 16.
" " 19.....	" " 17.
" " 20.....	" " 18.
" " 21.....	" " 19.
" " 22.....	" " 20.
" " 23.....	" " 21.
Order XXXII., Rule 1.....	Order XXVIII., Rule 1.
" " 2.....	" " 2.
" " 3.....	" " 3.
" " 4.....	" " 4.
Order XXXIII.....	Order XXIX., Rule 1.
Order XXXIV., Rule 1.....	Order XXX., Rule 1.

ORDERS.

## RULES SUPREME COURT, 1875.

Order XXXIV., Rule 1.....	1.....
" " 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....
" " 5.....	5.....
Order XXXV., Rule 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....
" " 5.....	5.....
" " 6.....	6.....
" " 7.....	7.....
" " 8.....	8.....
" " 14.....	14.....
Order XXXVI., Rule 1.....	1.....
" " 4.....	4.....
" " 6.....	6.....
" " 7.....	7.....
" " 8.....	8.....
" " 9.....	9.....
" " 10.....	10.....
" " 15.....	15.....
" " 17.....	17.....
" " 18.....	18.....
" " 19.....	19.....
" " 20.....	20.....
" " 21.....	21.....
" " 23.....	23.....
" " 24.....	24.....
" " 30.....	30.....
" " 31.....	31.....
" " 32.....	32.....
" " 33.....	33.....
" " 34.....	34.....
Order XXXVII., Rule 1.....	1.....
" " 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....
Order XXXVIII., Rule 1.....	1.....
" " 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....
" " 5.....	5.....
" " 6.....	6.....
Order XXXIX., Rule 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....
" " 5.....	5.....
Order XL., Rule 1.....	1.....
" " 7.....	7.....
" " 8.....	8.....
" " 9.....	9.....
" " 10.....	10.....
" " 11.....	11.....
Order XLI., Rule 1.....	1.....
" " 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....
" " 5.....	5.....
" " 6.....	6.....
Order XLII., Rule 1.....	1.....
" " 2.....	2.....
" " 3.....	3.....
" " 4.....	4.....

## ONTARIO ACT AND ORDERS.

Order XXX., Rule 1 (b).	1 (b).
" " 1 (s).	1 (s).
" " 2.	2.
" " 3.	3.
" " 4.	4.
" " 5.	5.
Order XLIX., Rule 4.	4.
" " 5.	5.
Sec. 76.	
Order XLIX., Rule 11.	11.
" " 12.	12.
" " 13 (c).	13 (c).
" " 13 (e).	13 (e).
" " 13 (d).	13 (d).
Order XXXI., Rule 1.	1.
" " 2.	2.
" " 3.	3.
" " 4.	4.
" " 5.	5.
" " 6.	6.
" " 7.	7.
" " 8.	8.
" " 9.	9.
" " 15.	15.
" " 16.	16.
" " 17.	17.
" " 19.	19.
" " 21.	21.
" " 22.	22.
" " 23.	23.
" " 24.	24.
" " 25.	25.
" " 26.	26.
" " 27.	27.
Order XXXII., Rule 1.	1.
" " 2.	2.
" " 3.	3.
" " 4.	4.
Order XXXIV., Rule 1.	1.
" " 2.	2.
" " 3.	3.
" " 4.	4.
" " 5.	5.
" " 6.	6.
Order XXXV., Rule 4.	4.
" " 5.	5.
" " 6.	6.
" " 7.	7.
Order XXXVI., Rule 1.	1.
" " 4.	4.
" " 5.	5.
" " 6.	6.
" " 7.	7.
" " 8.	8.
Order XXXVII., Rule 1.	1.
" " 2.	2.
" " 3.	3.
" " 4.	4.
" " 5.	5.
" " 6.	6.
Order XXXVIII., Rule 1.	1.
" " 2.	2.
" " 3.	3.
" " 4.	4.



## RULES SUPREME COURT, 1875.

Order XLII., Rule 5.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 8.	.....
“ “ 10.	.....
“ “ 11.	.....
“ “ 12.	.....
“ “ 13.	.....
“ “ 14.	.....
“ “ 15.	.....
Order XLII., Rule 16.	.....
“ “ 17.	.....
“ “ 18.	.....
“ “ 19.	.....
“ “ 20.	.....
“ “ 21.	.....
“ “ 22.	.....
“ “ 23.	.....
“ “ 24.	.....
Order XLIII., Rule 1.	.....
“ “ 2.	.....
Order XLIV., Rule 1.	.....
“ “ 2.	.....
Order XLV., Rule 2.	.....
“ “ 2.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 8.	.....
“ “ 9.	.....
“ “ 10.	.....
Order XLVIII., Rule 1.	.....
“ “ 2.	.....
Order XLIX.	.....
Order L., Rule 1.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 6.	.....
“ “ 7.	.....
Order LI., Rule 2.	.....
“ “ 4.	.....
Order LII., Rule 1.	.....
“ “ 2.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 6.	.....
Order LIII., Rule 1.	.....
“ “ 2.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 8.	.....
Order LIV., Rule 1.	.....
“ “ 2.	.....
“ “ 6.	.....
“ “ 5.	.....
“ “ 2.	.....
“ “ 5.	.....

## ONTARIO ACT AND ORDERS.

Order XXXVIII., Rule 5.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 8 (c)	.....
“ “ 9.	.....
“ “ 10.	.....
“ “ 11.	.....
“ “ 12.	.....
“ “ 13.	.....
“ “ 14 (b).	.....
Order XXXVIII., Rule 15.	.....
“ “ 16.	.....
“ “ 17.	.....
“ “ 18.	.....
“ “ 19.	.....
“ “ 20.	.....
“ “ 21.	.....
“ “ 22.	.....
“ “ 23.	.....
Order XXXIX., Rule 1.	.....
“ “ 2.	.....
Order XL., Rule 1.	.....
“ “ 2.	.....
Order XLI., Rule 1.	.....
“ “ 5.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 8.	.....
“ “ 9.	.....
“ “ 10.	.....
“ “ 11.	.....
“ “ 12.	.....
“ “ 13.	.....
Order XLII., Rule 1.	.....
“ “ 2.	.....
Order XLIII.,	.....
Order XLIV., Rule 1.	.....
“ “ 2.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 6.	.....
“ “ 7.	.....
Order XLV., Rule 1.	.....
“ “ 4.	.....
Order XLVI., Rule 1.	.....
“ “ 2.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 7.	.....
Order XLVII., Rule 1.	.....
“ “ 2.	.....
“ “ 3.	.....
“ “ 4.	.....
“ “ 5.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 8.	.....
Order XLVIII., Rule 1.	.....
Order XLIX., 6 (a).	.....
Order XLVIII., Rule 8.	.....
Order XLIX., “ 12.	.....
“ “ 13 (c).	.....
“ “ 13 (c).	.....

## RULES SUPREME COURT, 1875.

Order LIV., Rule 6.....	
“ “ 5.....	
Order LV., Rule 1.....	
Order LVI., Rule 1.....	
“ “ 2.....	
“ “ 3.....	
Order LVII., Rule 1.....	
“ “ 2.....	
“ “ 3.....	
“ “ 4.....	
“ “ 5.....	
“ “ 6.....	
Order LVIII., Rule 1.....	
Order LIX.....	
Order LX., Rule 1.....	
Order LXI., Rule 1.....	
“ “ 6.....	
“ “ 7.....	
Order LXII.....	

## RULES, SUP. CT., AUG., 1875.

(See Order L., Rule 20.)

Order XV.....	
Costs, XVI.....	
“ XVII.....	
“ XVIII.....	
“ XIX.....	
“ XXI.....	
“ XXIII.....	
“ XXIV.....	
“ XXV.....	
“ XXVI.....	
“ XXVIII.....	
“ XXX.....	
“ XXXI.....	
“ XXXII.....	
“ XXXIII.....	

Notice of 2nd Nov., 1875, W. N., 1875,  
pt. II., 469.Notice of 3rd Nov., 1875, W. N., 1875,  
pt. II., 468.

## RULES SUP. CT., DEC., 1875.

Rule IX.....	
“ XIV.....	

## RULES SUP. CT., FEB., 1876.

Rule II.....	
“ III.....	
“ IV.....	
“ V.....	
“ VI.....	
“ VII.....	
“ IX.....	

## RULES SUP. CT., JUNE, 1876.

Rule V.....	
“ VI.....	
“ VII.....	

## ONTARIO ACT AND ORDERS.

Order XLIX., Rule 13 (c).	
“ “ 13 (e).	

Order L., Rule 1.

Order LI., Rule 1.

“ “ 2.

“ “ 3.

Order LII., Rule 1.

“ “ 2.

“ “ 4.

“ “ 7.

“ “ 8.

“ “ 9.

Order LIV., Rule 2.

Order LV., Rule 1.

(Act, sec. 58).

Order LVII., Rule 1 (a).

“ “ 3.

“ “ 4.

Order LVIII.,

Order XXVII., Rule 12.

Order L., Rule 6.

“ “ 7.

“ “ 8; Order XXII., R. 1 (e).

“ “ 9.

“ “ 10.

“ “ 11.

“ “ 13.

“ “ 14.

“ “ 15.

“ “ 18.

“ “ 20.

“ “ 21.

“ “ 22.

“ “ 23.

Order LXII., Rule 1.

Order L., Rule 2 (a), 12 (b).

Order XIX., Rule 2.

Order XXXI., Rule 9.

Order III., Rule 1.

“ “ 2.

“ “ 3.

Order VIII., Rule 2.

Order II., Rule 6.

Order L., Rule 2.

Order LVII., Rule 2.

Order VII.; Order VIII., Rule 9.

Order VIII., Rule 9.

Order XII., Rule 11.

## RULES SUP. CT., JUNE, 1876.

Order VIII.	.....
" X.	.....
" XII.	.....
" XIII.	.....
" XIV.	.....
" XV.	.....
" XVI.	.....
" XVII.	.....
" XVIII.	.....
" XIX.	.....

## RULES SUP. CT., DEC., 1876.

Order III.	.....
" V.	.....
" VI.	.....
" VII., 1st part	.....
" " 2nd part	.....
" VIII.	.....

## RULES SUP. CT., MAY, 1877.

Order III.	.....
------------	-------

## RULES SUP. CT., MARCH, 1879.

Order V.	.....
" VI.	.....
" VII.	.....
" VIII.	.....

## RULES SUP. CT., DEC., 1879.

Order V.	.....
----------	-------

## RULES SUP. CT., FEB., 1880.

Order VI.	.....
-----------	-------

## RULES SUP. CT., APRIL, 1880.

Order VI.	.....
" VII.	.....
" VIII.	.....
" IX.	.....
" X.	.....
" XI.	.....
" XII.	.....
" XIII.	.....
" XIV.	.....
" XV.	.....
" XVI.	.....
" XVII.	.....
" XVIII.	.....
" XXXII.	.....
" XXXIV.	.....
" XXXV.	.....
" XXXIX.	.....
" XLI.	.....
" XLII.	.....
" XLIII.	.....
" XLIV.	.....
" XLV.	.....
" LII.	.....

## ONTARIO ACT AND ORDERS.

Order XII., Rule 13.
Order XIX., Rule 3.
Order VIII., Rules 1, 3.
Order XXXI., Rule 2.
Sec. 63.
"
Order XXXVIII., Rule 9.
Order XLV., Rule 3.
Order XLIX., Rule 8.

Sec. 44; Order XXXI., Rule 20.
Order XXV., Rule 1.
Order XXV., Rule 3.
Order XXXVI., Rule 2.
Order XXXVI., Rule 3 (a).
Sec. 28, sub-a. 2; Order LIV., Rule 1.

Order X., Rule 1.
-------------------

Order XXXI., Rule 27.
Order XXXV., Rule 2, 3.
Order XLVI., Rule 8.
Order XLVIII., Rule 3.

Order XXXVII., Rule 14.
-------------------------

Order VIII., Rule 2.
----------------------

Order VIII., Rule 6 (a).
Order XII., Rule 23.
" " 26.
Order XXX., Rule 1 (a).
" " 6.
Sec. 76.
Order LIII., Rule 1.
" " 2.
" " 3.
" " 4.
" " 5.
" " 6.
" " 7.
Order XLVI., Rule 6.
Order XLIX., Rule 11 (a).
" " 11 (b).
Order XLVIII., Rule 2.
Order L., Rule 3.
Order LII., Rule 5.
" " 6.
Order LV., Rule 2.
Sec. 8.
Order LIX.

## RULES SUP. CT., APRIL, 1880.

Order LIV.	.....
“ LXV.	.....
Form B., 10 (a).	.....
“ H., 31, 32.	.....
“ “ 22.	.....
“ “ 30.	.....

## DOMINION STATUTES.

32 and 33 Vic., cap. 30, sec. 26.	.....
38 “ “ 11 “ 17, 49.	.....
39 “ “ 36.	.....
42 “ “ 39, sec. 8.	.....

## ONTARIO STATUTES.

C. S. U. C., cap. 11, sec. 2, 6.	.....
“ “ 38 “ 49.	.....
29 and 30 Vic., cap. 29.	.....
32 “ “ 29, sec. 17.	.....
36 “ “ 8 “ 52.	.....
37 “ “ 7 “ 5.	.....
40 “ “ 6 “ 9 (a).	.....
41 “ “ 8 “ 3.	.....
41 “ “ 8 “ 4.	.....
41 “ “ 8 “ 8.	.....
42 “ “ 19 “ 16, 17.	.....
43 Vic., cap. 3, sec. 54, sub-s. 14.	.....
43 “ “ 8 “ 21.	.....
43 “ “ 8 “ 23.	.....
43 “ “ 8 “ 24.	.....
43 “ “ 8 “ 26.	.....

## REVISED STATUTES OF ONTARIO.

P. XIII., (B. N. A. Act), sec. 96.	.....
Cap. 1, sec. 8, sub-s. 16.	.....
Cap. 7, “ 7.	.....
Cap. 11, “ 33.	.....
Cap. 16, “ 32 and 33.	.....
“ “ 37.	.....
Cap. 21, “ 15.	.....
Cap. 38, “ 3.	.....
“ “ 4.	.....
“ “ 6.	.....
“ “ 7.	.....
“ “ 9.	.....
“ “ 10.	.....
“ “ 16.	.....
“ “ 18.	.....
“ “ 18, sub-s. 3.	.....
“ “ 19.	.....
“ “ 22.	.....
“ “ 26.	.....
“ “ 40.	.....
“ “ 45.	.....
“ “ 46.	.....
“ “ 47.	.....
“ “ 48.	.....
“ “ 49.	.....
“ “ 56.	.....

## ONTARIO ACT AND ORDERS.

Sec. 87.	.....
Order LII., Rule 10.	.....
Order XXVII., Rule 13.	.....
Order XXIX., Rule 2 (c).	.....
“ “ 3 (e).	.....
Order XXXIII.	.....

Sec. 83.	.....
“ 43.	.....
“ 83.	.....
“ 43.	.....

Sec. 85.	.....
“ 33.	.....
“ 85.	.....
“ 60.	.....
“ 9.	.....
“ 3, sub-s. 7.	.....
“ 60.	.....
“ 54, sub-s. (c).	.....
“ 26; Order XLV., Rule 2	.....
Order XXVII., Rule 1.	.....
Sec. 54, sub-s. (c).	.....
“ 64 “ 14.	.....
“ 54 “ (c).	.....
“ 70 “ 7.	.....
“ 71.	.....
“ 72.	.....

Sec. 3, sub-s. 4.	.....
Order LII., Rule 2.	.....
Sec. 88.	.....
“ 27.	.....
Order VI., Rule 2.	.....
Sec. 64, sub-s. 14.	.....
“ “ 13.	.....
Sec. 4.	.....
“ 3 “ 4.	.....
“ 3 “ 7.	.....
“ 5.	.....
“ 40; Order XLIX., Rule 7.	.....
“ 4.	.....
“ 36.	.....
“ 13.	.....
“ 32.	.....
“ 54, sub-s. (c).	.....
“ 14.	.....
“ 38.	.....
Order XLIV., Rule 3.	.....
Sec. 39.	.....
“	.....
“	.....
Sec. 38 and 43.	.....
“ 54, sub-s. 5.	.....

## REVISED STATUTES OF ONTARIO.

## ONTARIO ACT AND ORDERS.

Cap. 39, sec. 4.....	Order LVIII.
" " 8.....	Sec. 3, sub-s. 4.
" " 9.....	" 5.
" " 11.....	Order LVII., Rule 1 (a).
" " 12.....	" 1 (b).
" " 20.....	Sec. 28.
" " 21.....	" sec. 23, sub-s. 3.
" " 22.....	" " 30.
" " 23.....	" "
" " 24.....	" "
" " 25.....	" "
" " 26.....	" "
" " 27.....	Sec. 85.
" " 28.....	" "
" " 29.....	Sec. 62, 76.
" " 30.....	" 62.
" " 31.....	" 62.
" " 32.....	" 62.
" " 44.....	Order III., Rule 11.
Cap. 40, sec. 3.....	Sec. 8, 51.
" " 5.....	" 3, sub-s. 4.
" " 7.....	" 5.
" " 8.....	" 62.
" " 9.....	" 62.
" " 10.....	" 62.
" " 11.....	" 58, sub-s. 5.
" " 12.....	" 61.
" " 13.....	" 61, sub-s. 2.
" " 14.....	" 61, sub-s. 2.
" " 16.....	" 64, 10; 79, sub-s. 2.
" " 23.....	" 46, 85.
" " 24.....	" 46, 85.
" " 25.....	" 46, 85.
" " 26.....	" 46, 85.
" " 27.....	" 85.
" " 28.....	" 62, 76.
" " 29.....	" 62.
" " 31.....	" 68, sub-s. 2 and 3.
" " 32.....	" 68, sub-s. 2 and 3.
" " 39.....	" 17, sub-s. 8.
" " 65.....	Order IX., Rule 1; Order XIV., Rule 1.
" " 70.....	Order VI., Rule 6.
" " 85.....	Order XXX., Rule 1.
" " 86.....	Sec. 17.
" " 87.....	Order XV.; Sec. 17, 20.
" " 95.....	Order VI., Rule 2.
" " 97.....	Order L., Rule 2.
Cap. 41, sec. 1.....	Sec. 9, 46, 85.
" " 2-10.....	" 46, 85.
" " 11.....	" 46.
" " 12.....	" 18, 19, 46.
Cap. 42, sec. 5.....	Sec. 66, sub-s. 9.
" " 55.....	" 64., sub-s. 11.
Cap. 43, " 14.....	Order LIX., Rule 2.
Cap. 47, " 6.....	Sec. 51.
Cap. 49, " 3.....	" 46.
" " 4.....	" 16, 17, 45.
" " 5.....	" 17, 44; Order XII., Rules 1, 2;
" " 7.....	Order XXIII., Rule 1.
" " 8.....	Order LV., Rule 2.
" " 17.....	Order XXIII., Rule 1; Order LV.,
" " 19.....	Rule 2.
	Order XLI., Rule 1.
	" Rule 2.

## REVISED STATUTES OF ONTARIO.

## ONTARIO ACT AND ORDERS.

Cap. '49, sec. 21.....	Sec. 17, 26.
" " 22.....	" 26.
" " 23.....	" 17, 26.
" " 24-29.....	" 17, 26.
" " 31.....	" 45.
" " 45, sub-s 7.....	" 54 sub-s. (d).
" " 54.....	" 54 sub-s. 5.
Cap. 50, sec. 3.....	Order III., Rule 2.
" " 10.....	Order III., Rule 10.
" " 12.....	Order VIII., Rule 1; Order XLIX., Rule 5.
" " 16.....	Order III., Rule 8 (a).
" " 17.....	" " 9 (b).
" " 19.....	" " 4.
" " 20.....	Order VI., Rule 2.
" " 21.....	" " 10.
" " 22.....	" " 10.
" " 23.....	" " 2.
" " 25.....	" " 12 (a).
" " 26.....	Order III., Rule 17.
" " 27.....	Order V., Rule 1 (c).
" " 28.....	" " 1 (c), 2.
" " 29.....	" " 1 (c).
" " 48.....	Order II., Rule 4; Order VII., Rule 3.
" " 49.....	" " 4; Order VII., Rules 3, 4.
" " 50.....	Order II., Rule 4; Order VII., Rules 3, 4, 5.
" " 51.....	Order II., Rule 4; Order VII., Rules 3, 4, 1 (c).
" " 52.....	Order II., Rule 4.
" " 53.....	" " 4.
" " 56.....	Order IV., Rule 1 (b).
" " 60.....	Order VIII., Rule 12.
" " 61.....	" Rules 2, 4, 5.
" " 62.....	" Rules 2, 6.
" " 64.....	Order IX., Rule 4.
" " 65.....	" Rules 6, 7.
" " 69.....	" Rule 5.
" " 73.....	Order XII.; Order XII., Rule 15.
" " 83.....	Order XII.
" " 84.....	Order XIII., Rules 1, 2.
" " 85.....	" Rules 1, 8.
" " 86.....	" Rules 1, 4.
" " 89.....	Sec. 64, s.-s. 5.
" " 93.....	Order XVII., Rule 1 (a).
" " 94.....	Order XVI., Rule 2.
" " 95.....	Order LII., Rules 7, 8.
" " 100.....	Order XVIII., Rule 1.
" " 101.....	" 1.
" " 106.....	Order XVI., Rule 3.
" " 107.....	" Rules 3, 5.
" " 108.....	Order XXVI., Rule 1.
" " 109.....	" Rules 1, 2, 3.
" " 110.....	" Rule 1.
" " 111.....	" 4.
" " 117.....	Order XV., Rule 24; Order XXI.
" " 118.....	Order XXIV., Rules 5, 6.
" " 120.....	Order XXIII., Rule 1.
" " 121.....	Sec. 67; Order LVI., Rule 3.
" " 128.....	Order XXIV., Rule 2.
" " 131.....	Sec. 17.
" " 133.....	" 17.
" " 148.....	" 76; Order LIX., Rule 8.

RDERS.

IV., Rule 1.

Rules 1, 2;

Order LV.,

REVISED STATUTES OF ONTARIO.	ONTARIO ACT AND ORDERS.
Cap. 50, sec. 148, s.-s. 2.....	Order XLIX., Rule 8 (a).
" " 150.....	Order XXV., Rule 2.
" " 156, 168.....	Order XXVII., Rule 2.
" " 169.....	" Rules 2, 3, 4.
" " 170.....	" Rules 2, 3, 14.
" " 171.....	" Rules 2, 3; Order
" " 172-175.....	XXVIII., Rule 2.
" " 181.....	Order XXVII., Rule 3.
" " 182.....	Order XXX., Rules 1, 1 (c).
" " 185.....	" Rule 1 (a).
" " 189.....	" Rules 1, 1 (c).
" " 195.....	Secs. 47, 50, 62, 63; Order XI., Rvle 1;
" " 197.....	Order XXIX., Rule 1.
" " 211.....	Sec. 47.
" " 227.....	Sec. 47; Order XI., Rule 1; Order
" " 228.....	XXIX., Rule 1.
" " 229.....	Order XXXI., Rule 27.
" " 230-242.....	Sec. 50.
" " 248.....	Orders XLIV., XLIV., Rule 1.
" " 249.....	" " 2.
" " 252-258.....	Order XLIV.
" " 254.....	Order XXXI., Rule 11.
" " 259.....	Sec. 46; Order XXXI., Rule 14.
" " 262.....	Sec. 45.
" " 270.....	Order XXXI., Rule 6.
" " 281.....	Order XXXI., Rule 19.
" " 281, s.-s. 2.....	" Rule 20.
" " 282.....	Order XXIII., Rule 1; Order LV.,
" " 284.....	Rule 2.
" " 285.....	Sec. 28.
" " 286.....	Sec. 36.
" " 289.....	Sec. 28.
" " 302.....	Order XXXV., Rule 3.
" " 303.....	" " 3, (a).
" " 304.....	" Rules 3, 3 (b).
" " 307.....	" " 5, 6.
" " 308.....	Order XXXVII., Rule 1; Order XLIX.,
" " 309.....	Rule 5.
" " 310.....	Order VIII., Rule 1; Order XLIX.,
" " 313.....	Rule 5.
" " 313, s.-s. 2.....	Order XLI., Rule 1.
" " 317.....	" " 5.
" " 320.....	" " 6.
" " 321.....	" " 7.
" " 322.....	" " 8.
" " 329, et seq.....	" " 9.
" " 334.....	" " 10.
" " Sched. A. Form 1.....	" " 11.
Cap. 51, sec. 3.....	" " 11.
" " 8.....	" " 13.
" " 10.....	Order XXXVIII., Rule 17.
" " 12.....	Order II., Rule 1.
" " 13.....	Order L., Rule 18.
" " 14.....	Order III., Rule 12.
" " 20.....	Order XVIII., Rule 1.
" " 70.....	Order VI., Rule 11.
Cap. 52.....	Order VIII., Rule 14.
Cap. 63.....	" " 15.
	" " 17.
	Order XV., Rule 20.
	Order IX., Rule 8.
	Order IX., Rule 9.
	Sec. 17, s.-s. 8.
	Sec. 73.

## REVISED STATUTES OF ONTARIO.

Cap. 66, sec. 7	.....
"    "    11	.....
"    "    12	.....
"    "    44	.....
Cap. 67, sec. 8	.....
"    "    10, 11	.....
"    "    12	.....
Cap. 68, .....	.....
"    80	.....
"    108, sec. 30	.....
"    110, "    23	.....
"    116, "    6	.....
"    125	.....
"    125, sec. 20	.....
"    137	.....
"    149, sec. 43	.....
"    150, "    60	.....
"    220, "    49	.....
"    220, "    50	.....
"    220, "    51	.....

## ONTARIO GENERAL ORDERS, CHANCERY.

G.O.C. 14	.....
"    15	.....
"    33	.....
"    34	.....
"    35	.....
"    36	.....
"    37	.....
"    38	.....
"    39	.....
"    40	.....
"    41	.....
"    44	.....
"    47	.....
"    48	.....
"    53	.....
"    58-61	.....
"    62	.....
"    66	.....
"    67	.....
"    68	.....
"    71	.....
"    73	.....
"    77	.....
"    83	.....
"    86	.....
"    88	.....
"    89	.....
"    90	.....
"    93	.....
"    98	.....
"    99	.....
"    100	.....
"    102	.....
"    113, <i>et seq.</i>	.....
"    121	.....

## ONTARIO ACT AND ORDERS.

Order XLIX., Rule 5.	
Order XXXVIII., Rule 15.	
"    "    16.	
"    "    12.	
Order II., Rule 1.	
Order XL., Rule 1.	
Order XXXVIII., Rule 19.	
Order I., Rule 4.	
Sec. 73.	
Sec. 17, s.-s. 2.	
Sec. 62.	
Sec. 17, s.-s. 6.	
Order XII., Rule 9.	
Order VI., Rule 3.	
Order II., Rule 1.	
Order VI., Rule 10.	
Order VI., Rule 6; Order XIV., Rule 1.	
"    "    "	
Sec. 62.	
Order XLIX., Rule 3.	
Sec. 62, Order XLIX., Rule 3; Order III., Rule 2.	
Sec. 62, Order XLIX., Rule 3; Order VIII., Rule 1.	
Sec. 62, Order XLIX., Rule 3.	
Sec. 62, Order XLIX., Rule 3.	
Sec. 62, Order XLIX., Rule 3, sec. 62; Order IX., Rule 10.	
Order XLIX., Rule 3; Order III., Rule 2.	
Order III., Rule 8 (a).	
"    "    Rule 9 (b).	
Order VI., Rule 1.	
Order XXVIII., Rule 4.	
Order XII., Rule 15.	
Order XII., Rule 7; Order XII., Rules 10, 14.	
Order XII., Rule 5.	
Order XV., Rule 5.	
Order LI., Rule 2.	
Order XII., Rule 14; Order LIIL, Rule 1.	
Order XV., Rule 2 (c).	
Order XLIX., Rule 3.	
Order III., Rule 10.	
Order XXIII., Rule 8.	
Order III., Rule 12.	
Order XVII., Rule 1.	
"    "    "	
Order II., Rule 4; Order VII.	
Order V., Rule 1 (c).	
"    "    "	
Order VI., Rule 2.	
Order VII.	
Order II., Rule 4; Order VI., Rule 2; Order VII.; Order VII., Rule 3.	
Order IX., Rule 11.	
Order XXIV., Rule 7 (a).	



## ONTARIO GENERAL ORDERS, CHANCERY.

G.O.C.123.
" 124.
" 125.
" 131.
" 134.
" 135.
" 136.
" 137.
" 144.
" 146.
" 149.
" 150.
" 151.
" 155.
" 156.
" 161.
" 163.
" 167.
" 180.
" 184.
" 197.
" 211.
" 214.
" 221.
" 234.
" 258.
" 259.
" 266.
" 268.
" 269.
" 270.
" 272.
" 273.
" 288.
" 294.
" 321.
" 337.
" 338.
" 339.
" 340.
" 341.
" 342.
" 343.
" 352.
" 372.
" 397.
" 403.
" 404.
" 408.
" 410.
" 411.
" 413.
" 418.
" 432.

## ONTARIO ACT AND ORDERS.

Order XV., Rule 24.
Order XVIII., Rule 4; Order XXVIII.
Rule 1.
Order XV., Rule 22; Order XVIII.,
Rule 4.
Order LIII., Rule 5.
Order XXVII., Rule 4.
Order XXVII., Rule 10.
" " 20.
" " 10.
" " 18.
Order XXIV., Rule 7 (a); Order
XXVII., Rule 21.
Order XVI., Rule 2.
Order XXVIII., Rule 1.
Order XV., Rule 2.
Order XVI., Rule 2; Order XXIII.,
Rule 5.
Order XXVIII., Rule 2.
Order XXXI., Rule 2.
" " 6.
Order XXXII., Rule 1.
Order XVIII., Rule 4; Order XXVIII.,
Rule 1.
Order XXXVII., Rule 6.
Sec. 62.
"
"
Order XXXIII., Rule 3.
Order XVIII., Rule 4.
Order LIII., Rule 1.
Order XXXII., Rule 3.
" 4.
Order XXXII., Rule 2; Order
XXXIV., Rule 2.
Order XXXII., Rule 2; Order
XXXIV., Rule 20.
Order XXV., Rule 9; Order XXXVI.,
Rules 1, 8.
Order XXXVI., Rules 1, 10 (2).
Order XXXI., Rule 2.
Order XL., Rule 1.
" " Order XLII., Rule
1.
Order L., Rules 2, 3.
Order XLIV., Order XLIV., Rule 2.
" Rule 4.
" " 5.
" " 7.
" Order XLIV., Rule 6.
" Rule 8.
" " 9.
Order LVI., Rule 4.
" " 4.
Order XXXVII., Rule 13.
Order XV., Rule 5.
" " 6.
Order XVIII., Rule 1; Order LII.,
Rule 8.
Order LII., Rule 6.
" "
Sec. 18.
Order XXIV., Rule 7 (a).
Order IX., Rule 11.

## ONTARIO

G.O.C.433.
" 434.
" 435.
" 436.
" 467.
" 490.
" 517.
" 519.
" 520.
" 531.
" 532.
" 533.
" 534.
" 537.
" 566.
" 589.
" 610.
" 611.
" 612.
" 613.
" 614.
" 616.
" 620.
" 621.
" 622.
" 623.
" 627.
" 628.
" 633.
" 634.
" 636.
" 638.
" 639.
" 640.
" 641.
" 642.
" 643.
" 644.
" 645.
" 646.
" 647.
" 648.
" 649.
" 650.

Schedule 1

## ONTARIO GENERAL ORDERS, CHANCERY.

## ONTARIO ACT AND ORDERS.

G.O.C. 433.....	Order IX., Rule 11.
" 434.....	Order IX., Rules 10, 11.
" 435.....	" " "
" 436.....	Order I., Rule 3; Order III., Rule 6;
" 467-487.....	Order XI., Rules 1, 3.
" 495.....	Sec. 62.
" 517.....	Order VI., Rules 4 (c), 5, 7.
" 519.....	Order IX., Rule 1.
" 520.....	Order VI., Rules 4 (c), 5, 7; Order IX.,
" 531.....	Rule 1.
" 532.....	Sec. 62.
" 533.....	" "
" 534.....	" sec. 47, s.-s. 2.
" 537.....	Order XLIV., Rule 3.
" 560.....	Sec. 62.
" 589.....	" "
" 610.....	Order VI., Rule 4 (c); Order IX., Rule 1.
" 611.....	Order IX., Rule 1.
" 612.....	Order VI., Rule 4 (c).
" 613.....	" 3.
" 614.....	Order XXXVI., Rule 9.
" 616.....	Order VI., Rule 4 (c).
" 620.....	Order VII.; Order VII., Rule 2 (d);
" 621.....	Order XVIII., Rule 1.
" 625.....	Order VII., Rule 3.
" 626.....	Sec. 62.
" 627.....	" "
" 633.....	Order LVI., Rules 3, 4.
" 634.....	Sec. 62.
" 636.....	" "
" 638.....	" "
" 639.....	Order I., Rule 3; Order III., Rule 6;
" 640.....	Order XI., Rule 3; sec. 62.
" 641.....	Order I., Rule 3; Order III., Rule 6;
" 642.....	Order XI., Rule 3; sec. 62; Order
" 643.....	XLIX., Rule 10.
" 644.....	Order I., Rule 3; Order III., Rule 6;
" 645.....	Order XI., Rule 3; sec. 62.
" 646.....	Order I., Rule 3; Order III., Rule 6;
" 647.....	Order XI., Rule 3; sec. 62.
" 648.....	Order I., Rule 3; Order III., Rule 6;
" 649.....	Order XI., Rule 3; sec. 61; Order
" 650.....	IX., Rule 10.
Schedule G.....	Order I., Rule 3; Order III., Rule 6;
	Order XI., Rule 3; sec. 62.
	Order I., Rule 3; Order III., Rule 6;
	Order XI., Rule 3; sec. 62.
	Order XXVII., Rule 10.

## ONTARIO GENERAL ORDERS, CHANCERY.

Court of Appeal Orders, March, 1878,  
No. 2 .....

## ONTARIO REG.-GEN., T.T., 1856.

No. 1.....	
" 2.....	
" 3.....	
" 11.....	
" 13.....	
" 14.....	
" 15.....	
" 21.....	
" 22.....	
" 23.....	
" 24.....	
" 46.....	
" 55.....	
" 93.....	
" 109.....	
" 110.....	
" 111.....	
" 112.....	
" 113.....	
" 135.....	
" 138.....	
" 159.....	

## REG. GEN., HILARY TERM, 1870, ONT.

Reg. Gen., H. T., 1870.....	
No. 49.....	
Reg.-Gen., 21st May, 1877 .....	

## ONTARIO ACT AND ORDERS.

Order L., Rule 3.

Order VIII., Rule 7.

" " 10.

" " 11.

Order XXVI., Rules 1, 3.

" " Rule 1.

Order XXIV., Rule 8.

" " 8.

Order XV., Rule 21.

Order XVI., Rule 3.

" " 3.

Order XIX., Rules 1 (c), 3.

Order LII., Rule 2.

Order XXXVIII., Rules 10, 13.

Order VIII., Rule 16.

Order LIII., Rule 2.

" " 3.

" " 5.

" " 1.

" " 6.

Order LII., Rule 6.

Order III., Rule 9 (b).

Order XXVIII., Rule 4.

See Sec. 62.

Order XLIX., Rules 12, 13 (c).

Order XXIV., Rule 6.

An Act  
a un  
make  
of Ju

HER Le  
as follow

1. Th  
1881."

2. Th  
to take e  
fied date  
day of A

See Imp  
The auth  
1st day of J

3. Fro  
of this A  
to say) t  
Court of  
united a  
and subje  
of Judica

See Imp  
The com  
this section,

(2) T

An Act to consolidate the Superior Courts; establish a uniform system of pleading and practice; and make further provision for the due Administration of Justice.

[Assented to 4th March, 1881.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "The Ontario Judicature Act, 1881."

2. This Act, except any provision thereof which is declared to take effect on the passing of this Act, or at any other specified date, shall commence and come into operation on the 22nd day of August, 1881.

See Imp. Act of 1873, s. 2.

The authority of County Court Judges as to Chambers matters dates from the 1st day of January, 1882, O. XLIX., R. 8.

---

## PART I.

### CONSTITUTION OF SUPREME COURT.

3. From and after the time appointed for the commencement of this Act, the several Courts hereinafter mentioned (that is to say) the Court of Appeal, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature for Ontario.

See Imp. Act of 1873, s. 3.

The complete consolidation which is intended is further shown by sub-sec. 5 of this section, and sections 4, 7, and 9.

(2) The Supreme Court shall consist of two permanent divisions. The said Courts of Queen's Bench, Chancery and Common Pleas shall constitute one of such divisions,

and shall be called "The High Court of Justice for Ontario." The said Court of Appeal shall constitute the other division, and shall be called "The Court of Appeal for Ontario."

See Imp. Act of 1873, s. 4.

- (3) The Court of Queen's Bench shall thereafter be called the Queen's Bench Division of the High Court; the Court of Chancery shall be called the Chancery Division thereof; and the Court of Common Pleas shall be called the Common Pleas Division thereof; the Judges of the said three Courts or Divisions shall be called Justices of the High Court.

See Imp. Act of 1873, s. 31; Imp. Act of 1877, s. 4.

- (4) The persons hereafter appointed to fill the places of the Chief Justice of the Queen's Bench, the Chancellor of Ontario, and the Chief Justice of the Common Pleas, and their successors respectively, are to be appointed by the authority mentioned in the British North America Act, and with the same respective titles as heretofore.

See Imp. Act of 1873, s. 5; B. N. A. Act, s. 96; R. S. O., c. 38, s. 4; c. 39, s. 8; c. 40, s. 5. The British North America Act (Imp. Act, 30 and 31 Vic., c. 3), sec. 96, provides for the appointment of the Superior Court Judges in each Province by the Governor-General. Only barristers of ten years' standing at the Bar of Ontario are eligible for appointment as Judges of the Courts of Queen's Bench, Chancery, and Common Pleas, R. S. O., c. 40, s. 5. The Judges of the Court of Appeal may be selected from the Judges for the time being, or retired Judges of the Courts of Queen's Bench, Chancery, or Common Pleas, or from such barristers as are eligible to be appointed Judges of these Courts, R. S. O., c. 38, s. 4.

- (5) Save as in this Act is otherwise expressly provided, all the Judges hereinbefore mentioned, and their successors, shall have in all respects equal power, authority, and jurisdiction.

See Imp. Act of 1873, s. 5.

- (6) The Chief Justice of the Queen's Bench shall be the President of the Queen's Bench Division, the Chancellor shall be the President of the Chancery Division, and the Chief Justice of the Common Pleas shall be the President of the Common Pleas Division.

See Imp. Act of 1873, s. 31.

- (7) Such one of the said three Judges as at the time of the passing of this Act may be entitled to precedence over

See  
c. 7, s. 1  
The  
by R. S.

(8)

See 1

(9)

See 1  
The  
consolid

The Hi

1. Th

Hi

2. Th

Cov

3. Th

Hi

Judges

High

It is  
alike as  
of Cana  
used.

4.

contin

of a

and

as in

ment

the other two, shall be the first President of the High Court; and on his ceasing to be President, the President of the said High Court shall be that one of the Presidents of the Queen's Bench, Chancery and Common Pleas Divisions, who, for the time being, is first in order of seniority.

See Imp. Act of 1873, s. 5; Imp. Act of 1875, s. 6; R. S. O., c. 38, s. 6; 37 Vic., c. 7, s. 5.

The order of precedence among the Judges of the different Courts is regulated by R. S. O., c. 38, s. 6.

- (8) Upon any vacancy happening among the Judges, the Judge appointed to fill such vacancy is (subject to the provisions of this Act, and to any Rules of Court which may be made pursuant thereto) to become and be a member of the same Division to which the Judge whose place has become vacant belonged.

See Imp. Act of 1873, s. 31.

- (9) Nothing in this Act shall prevent, or shall be construed as intended to prevent, the transfer of any Judge of any of the said Divisions from one to another of the said Divisions.

See Imp. Act of 1873, s. 31.

The following table shews at a glance the effect of the preceding sections as to consolidation:

THE SUPREME COURT OF JUDICATURE FOR ONTARIO.

DIVISION 1.

DIVISION 2.

The High Court of Justice for Ontario:

The Court of Appeal for Ontario.

1. The Queen's Bench Division of the High Court of Justice for Ontario.
2. The Chancery Division of the High Court of Justice for Ontario.
3. The Common Pleas Division of the High Court of Justice for Ontario.

Judges to be called "Justices of the High Court."

Judges to be called "Justices of Appeal."

It is unfortunate that there should be two distinct Courts with names so much alike as "The Supreme Court of Justice for Ontario," and "The Supreme Court of Canada." To distinguish between them the whole title of each will have to be used.

4. The Court of Appeal for Ontario, at present existing, is continued, under that name, and shall, as heretofore, consist of a Chief Justice, to be called the Chief Justice of Ontario, and three other Judges, to be called Justices of Appeal, as in the Act respecting the Court of Appeal, (R. S. O. cap. 38,) mentioned; and the said Judges of the Courts of Queen's

MCCORD UNIVERSITY LAW LIBRARY

Bench, Chancery and Common Pleas, and their successors the Justices of the High Court, shall be *ex officio* Judges of the Court of Appeal, for the same purposes and with the same duties and powers as by the said Act is provided with respect to the Judges of the Courts of Queen's Bench, Chancery, and Common Pleas.

See Imp. Act of 1875, s. 4; R. S. O., c. 38, ss. 3, 10.

"Existing" means existing at the time appointed for the commencement of this Act, see sec. 91.

The Judges of the Courts of Queen's Bench, Chancery, and Common Pleas, are *ex officio* Judges of the Court of Appeal for the following purposes: in case of there being a vacancy in the Court of Appeal, or in case from illness or some other cause one or more of the Judges of the said Court is or are not present at some sitting of the Court, or in case one or more of the said Judges is or are under some legal disqualification to hear an appeal, the Judges of the Courts of Queen's Bench, Chancery, and Common Pleas shall choose from amongst their number a Judge, or as many Judges as necessary, to supply, for the time, the place or places vacant, or the place or places of the Judge or Judges of the Court of Appeal so absent or disqualified; and the Judges so chosen and acting shall have authority to continue to hear appeals partly heard before them, and to give judgment in all appeals heard before them; notwithstanding that such vacancy may in the meantime have been filled up, or that the Judge who was absent may have returned to his duties, R. S. O., c. 38, s. 10. A Judge whose judgment is appealed against, or who took part in the trial at *Nisi Prius*, or in the Court below, cannot sit on the proceedings in the Court of Appeal. *Ibid*, s. 13. As to disqualification of Judges by reason of interest, see *Boulton v. The Church Society*, 15 Gr. 450; *Dimes v. Grand Junction Canal Company*, 3 H. L. 759.

5. The oath to be taken by the Judges to be hereafter appointed shall be the following:—"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as ; so help me God."

The oath is to be administered to the Chief Justices and the Chancellor by the Lieutenant-Governor in Council, and to the Justices of the High Court, other than the Chief Justices, in presence of the President of the High Court; and to the Justices of the Court of Appeal in open Court by the Chief Justice of Ontario, unless the Lieutenant-Governor in any of such cases shall otherwise direct.

See R. S. O., c. 38, s. 7; c. 39, s. 9; c. 40, s. 7; Imp. Act, 31 and 32 Vic., c. 72; Imp. Act of 1873, s. 9; Imp. Act of 1875, s. 5.

6. Every existing Judge is, as to all matters within the legislative authority of this Province, to remain in the same condition as if this Act had not passed; and, subject to the provisions of this Act, each of the said existing Judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform if this Act had not passed.

See Imp. Act of 1873, s. 11.

"Existing" means existing at the time of the commencement of this Act, see sec. 91.

7.  
liability  
to the  
confe  
Judge  
said,  
High  
and s  
every  
if thi  
the s  
such

See

(2)

See

8.  
time.  
Cour  
tucat  
seals  
and  
for t

See  
This  
to be  
seal u  
existe  
office  
be us

Rec

7. If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice shall have been imposed or conferred by any statute or law upon the Judges or any Judge of any of the Courts united and consolidated as aforesaid, (save as hereinafter mentioned) every Judge of the said High Court shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a Judge liable to such duty, or possessing such authority or power, before the passing of this Act.

See Imp. Act of 1873, s. 12.

- (2) Any such duty, authority, or power, imposed or conferred in any such case as aforesaid, upon the Chief Justice of Ontario, the Chancellor, the Chief Justice of the Queen's Bench, or the Chief Justice of the Common Pleas, shall continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if this Act had not passed.

See Imp. Act of 1873, s. 12.

8. The Lieutenant-Governor in Council may from time to time, determine and declare the seal to be used in the Supreme Court and by which its proceedings shall be certified and authenticated; and until there is a seal for the Supreme Court, the seals now in use in and for the existing Courts may be used in and for the respective Divisions of the High Court, and in and for the Court of Appeal respectively.

See Imp. Act of 1874, s. 61; R. Sup. C., April, 1880, R. 45; R. S. O. c. 40, s. 3. This provision that the Lieutenant-Governor may determine and declare the seal to be used in the Supreme Court, agrees with the statutory enactment as to the seal used in the Court of Chancery, R. S. O., c. 40, s. 3. No such enactment existed as to the seals of the Court of Appeal and Common Law Courts. In the office of every Deputy Registrar and Deputy Clerk of the Crown, such seal is to be used as the Lieutenant-Governor shall from time to time direct, see sec. 51.

---

## PART II.

### JURISDICTION

#### OF HIGH COURT.

9. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, shall have the



jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery (whether created by Commission or otherwise), and shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of this Act) under the name of the High Court of Justice aforesaid.

See Imp. Act of 1873, s. 16; R. S. O., c. 41, s. 1, *et seq.*; 36 Vic. (Ont.), c. 8, ss. 52 and 55.

**Court of Record:**—"A Court of Record is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim, that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. All Courts of Record are the Courts of the Sovereign, in right of the Crown and Royal dignity, and therefore every Court of Record has authority to fine and imprison for contempt of its authority."—Stephens' Com., Vol. III., p. 269 (Ed. 7).

The Courts of Queen's Bench and Common Pleas are Courts of Record of original and co-ordinate jurisdiction, and respectively possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction; and have, use, and exercise all the rights, incidents, and privileges of a Court of Record, and all other rights, incidents, and privileges as fully to all intents and purposes as the same were on the 5th day of December, 1859, used, exercised, and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and hold plea in all and all manner of actions, causes and suits as well criminal as civil, real, personal, and mixed, and proceed in such actions, causes, and suits by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and hear and determine all issues of law; and hear and (with or without a jury, as provided by law) determine all issues of fact that may be joined in any such action, cause, or suit, and give judgment thereon, and award execution thereof in as full and ample a manner as might, at the said date, be done in Her Majesty's Courts of Queen's Bench, Common Bench, or, in matters which regard the Queen's revenue (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England, R. S. O., c. 39, s. 4. The Chief Justice and Justices of the said Courts respectively, shall have, use, and exercise all the rights, incidents, and privileges of a Judge of a Court of Record, and all other rights, incidents, and privileges as fully to all intents and purposes as the same were prior to the 5th day of December, 1859, used, exercised, and enjoyed by any of the Judges of any of Her Majesty's Superior Courts of Common Law, at Westminster, *ib.*, s. 6. As to the jurisdiction of the Courts of Law and Equity, with reference to the custody of infants, see R. S. O., c. 130; Jud. Act, sec. 17, s.-s. 9, and notes thereto.

The Court of Chancery has no jurisdiction in suits under the value of £10. In *Gilbert v. Braithwaite*, 3 Ch. Ch. R. 416, Strong, V.C., said: "The question involved in this appeal is as to the right of the plaintiff, who claims to have a charge upon land for the sum of \$24.79, to have this charge raised by a rule under the decree of this Court in the usual manner in default of payment. On an application made in Chambers by the defendant, the Referee, proceeding on the authority of *Westbrooke v. Browett* (17 Gr. 339), dismissed the bill, on the ground that Lord Bacon's ordinance of the 9th January, 1618, applies here, and that this Court will not entertain jurisdiction of a suit, the object of which is to compel the payment of less than £10. The expression used in the order is, 'shall not take jurisdiction in suits under the value of £10.' This ordinance is still considered as regulating the practice of the English Court of Chancery, and was of course acted upon in England at the time this Court was established by the Act of Upper Canada, 7 Wm. IV., Ch. 2. That Act gives to this Court, in the cases enumerated, 'the like jurisdiction and powers' as were at the time it was passed possessed by the Court of Chancery in England. It seems clear, therefore, that this Court was originally, under the Act of 1837, as much bound by the order referred to as was the English Court of Chancery."

As to the jurisdiction of the Court of Chancery, see R. S. O., c. 40, ss. 34, 36, 37, 39, 40, 41, 43, 49, 52, 53, 76, *post*; R. S. O., c. 46, ss. 28, 29, 30.

In the case of lunatics and their property and estates, the jurisdiction of the Court includes that which in England is conferred upon the Lord Chancellor by a Commission from the Crown under the Sign Manual, R. S. O., c. 40, s. 58. The Sign Manual takes its origin from 17 Edw. II., St. 1, c. 9, by which the rents and profits of the estates of idiots are given to the Crown. As to the extent of his jurisdiction under it, see Shelford on Lunacy, p. 15; and as to the distinction between the jurisdiction exercised by the Lord Chancellor in Chancery and in Lunacy, see *Murray v. French*, 2 Dick. 555; *Sherwood v. Sanderson*, 19 Ves. 280. For a recent and very important case, which illustrates the peculiar nature of the Chancellor's jurisdiction in Lunacy, see *Beall v. Smith*, L. R. 9 Ch. App. 85.

- (2) The jurisdiction aforesaid shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the said Courts, respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges or a Judge in pursuance of any statute or law; and all powers given to any such Court, or to any such Judges or Judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdiction.

See Imp. Act of 1873, s. 16.

10. From and after the commencement of this Act the several jurisdictions vested in the said High Court of Justice, shall cease to be exercised except in the name of the said High Court of Justice as provided by this Act, save as otherwise in this Act provided.

See Imp. Act of 1873, s. 22.

11. In all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected, at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same judges and officers, and generally in the same manner, in all respects as if this Act had not passed; and the same shall take effect, to all intents and purposes, as if the same had been duly perfected before the commencement of this Act.

See Imp. Act of 1873, s. 22.

"May" probably has force of "shall," for if it was intended that there should be an alternative and it should be argued that such decrees, etc., *may not* be perfected in the mode pointed out; the answer is that there is no other method. The word seems to bestow a power to complete something that otherwise might be incapable of completion, and the method prescribed is the way in which power may be exercised. Consider also the use of the word "shall" in sub-sec. 2. See, however, the Interpretation Act, R. S. O. c. 1, s. 7, sub-s. 2.

As to the practice and procedure in pending cases, see O. LXII.

The effect of the Act and Order taken together seems to be:—

1. As to the name of the Court in which proceedings are to be taken :
  - (1) If cause not heard the name of the new Court is to be used.
  - (2) If cause heard, decree, etc., is to be issued in the old name.
  - (3) If decree, etc., perfected, further proceedings are to be taken in new name.
2. As to procedure :
  - (1) Queen's Bench and Common Pleas Divisions.
    - (a) If no declaration delivered, the new practice is to govern.
    - (b) If declaration delivered, the old practice is to govern up to the close of the pleadings, and thenceforward the new.
  - (2) Chancery Division.
    - (a) If replication not filed or notice of motion for decree given, old practice up to time at which such replication or notice could be filed and served is to govern, and subsequent to that period the new practice.
    - (b) If replication filed, or notice of motion served, the old practice is to apply up to the conclusion of the suit.
  - (3) An order may be made in Chambers making the new practice applicable to any case.

- (2) Every judgment, decree, rule, or order of any Court whose jurisdiction is hereby vested in the High Court of Justice, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged, by the High Court of Justice, in the same manner as if it had been a judgment, decree, rule, or order of the said High Court; and all causes, matters, and proceedings whatsoever, which shall be pending in any of the Courts whose jurisdiction is so vested as aforesaid at the commencement of this Act, shall be continued and concluded in and before the High Court of Justice; and the said High Court shall have jurisdiction for so continuing and concluding matters criminal as well as civil.

See Imp. Act of 1873, s. 22; O. LX., *post*.

- (3) The said High Court shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the High Court of Justice, and continued therein down to the time at which this Act goes into effect; and, so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, shall be

continued and concluded, in and before the said High Court, as shall be directed by Rules or Orders of Court.

See Imp. Act of 1873, s. 22; O. L.X., *post*.

12. The jurisdiction of the High Court of Justice and the Court of Appeal, respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective existing Courts if this Act had not been passed.

See Imp. Act of 1873, s. 22.

Section 52 should be considered with this section. It is as follows:—"Save as by this Act or by any Rules of Court may be otherwise provided, all forms and methods (as nearly as may be) of procedure, which at the commencement of this Act, were in force in any of the Courts whose jurisdiction is by this Act vested in the said High Court, under or by virtue of any law, general order, or rule whatsoever, and which are not inconsistent with this Act, or with any Rules of Court, may continue to be used and practised, in the said High Court of Justice, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so vested, if this Act had not passed."

Ord. 1, after making provision for interpleader cases, and proceedings in mortgage, administration, and partition actions, provides as follows:—"Rule 4.—All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed. In case a defendant is let in to defend under the 11th section of the Revised Statute respecting absconding debtors, the action shall proceed as in ordinary cases under the Act, subject to the provisions in other respects of the said Revised Statute."

The Judicature Acts do not contain a complete body of practice, but have, in many cases to be supplemented by the former practice. *Cooke v. Oceanic Steam Company*, W. N. (1875), 220; *Laming v. Gee*, W. N. (1878), 240. It was said in *Bell v. Wilkinson*, W. N. (1878), 3: "Under the new system of pleading introduced by the Judicature Acts the practice of the Common Law Division ought, if possible, to be assimilated to the practice of the Chancery Division, and that the defendant ought therefore to have leave to put in his statement of defence." In *Newbiggin-by-the-Sea Gas Company v. Armstrong*, W. N. (1879), 203, which was an appeal from an order of Fry, J., directing that the action should be dismissed, and that the solicitor of the plaintiff company in the action should pay the costs of the company between solicitor and client, on the ground that he had issued the writ in the name of the company without any authority to do so, Jessel, M.R., said that the present order was made according to the old practice of the Court of Chancery in such cases, by which the defendant was not served with notice of the plaintiff's application, and was left to get his costs from the plaintiff, who had afterwards to get them over from the solicitor. The practice in the Common Law Courts appeared to be a better practice. There the defendant was served with notice of the application, and the solicitor was ordered to pay the costs of both plaintiff and defendant. The question was which practice ought to be followed since the Judicature Acts. That was a matter for the Courts to determine. He had no hesitation in saying, as he had already said at the Rolls Court, though not with the same authority that he now said it in the Court of Appeal, that he considered the Com-

mon Law practice to be founded on natural justice, and ought to be followed for the future. On the merits of the case he agreed with Mr. Justice Fry. Brett, L.J. said that he was very glad to hear the Master of the Rolls affirm what he had himself often said since the Judicature Act came into operation, that in matters of practice which were left open by the Act, that practice which upon consideration appeared to be best ought to prevail.

In *Bustros v. Bustros*, L. R. 14 Ch. D. 849, in which the respective merits of the different forms of affidavits of service formerly used was discussed, the decision seems to have turned upon these merits. Hall, V.C., said: "The difference between the two forms appears to be that the one describes the notice, whilst the other sets out a copy of it. I do not see why an affidavit that a person served a document, a copy of which is set forth in the affidavit, should not be at least as good, if not better, than an affidavit which describes the kind of document which was served. Therefore, without saying that the Chancery form will not do, I shall adopt the Common Law form, and state that I consider it sufficient."

See also sec. 17, sub-a. 10, which provides that "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter the rules of Equity shall prevail." It was held in *Grant v. Holland*; *Ross v. Grant*, L. R. 3 C. P. D. 180 under this sub-sec. that the Equity practice as to an order changing solicitor should prevail, and in *Bustros v. White*, L. R. 1 Q. B. D. at p. 426, *Jessel, M. R.*, construed the words as inclusive of practice.

### JURISDICTION OF COURT OF APPEAL.

**13.** The Court of Appeal shall be a Superior Court of Record, and shall continue to have all the jurisdiction and power which the said Court has heretofore had, save as varied by or under this Act; and in civil cases shall also have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of the High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which appeals shall be allowed, as may be made pursuant to this Act.

See Imp. Act of 1873, ss. 18, 19; R. S. O., c. 38, s. 18, *et seq.*

As to the appellate jurisdiction exercised by the Court, see R. S. O., c. 38, s. 18. The Court has also original jurisdiction in the trial of election cases under the Election Act, R. S. O., c. 10, and the Controverted Elections Act, R. S. O., c. 11; it also exercises all the powers of a Court of first instance as to amendments, and the reception of further evidence upon questions of fact, whether by oral examination of witnesses in Court, by affidavit or deposition taken before some person nominated by the Court, R. S. O., c. 38, s. 22.

No appeal is permitted without the special leave of the Court or Judge making the order, (1) from an order made by consent of parties, or as to costs only which by law are left to the discretion of the Court (as to such costs see Order L, r. 1), Sec. 32; (2) unless the title to real estate, or some interest therein, or the validity of a patent is affected, or the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights, or the matter in controversy exceeds the sum or value of \$200, exclusive of costs, Sec. 33; (3) or exceeds the sum of \$500, exclusive of costs, where there has been no difference of opinion among the Judges of the Divisional Court, or where, on a motion to set aside or discharge a rule, order or decision of a Judge, the Divisional Court does not substantially vary the rule, order, or decision moved against, Sec. 34; (4) or from a rule or decision made by a Judge in Chambers, Sec. 36. No appeal lies from an interlocutory order in

case before the passing of the Act there would have been no relief from a like order by an appeal to the Court of Appeal, Sec. 35. Any doubt as to what decrees, orders, or judgments are interlocutory is to be determined by the Court of Appeal, (*Ibid*).

As to requisite notice of appeal, see Sec. 38.

As to practice upon appeals, see Sec. 39.

For definition of Court of Record, see note to Sec. 9.

**14.** For all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

See Imp. Act of 1873, s. 19, second part; R. S. O., c. 38, s. 22.

By R. S. O., c. 38, it was provided as follows:—Sec. 22. The Court of Appeal shall have all the powers and duties as to amendment and otherwise, of the Court or Judge from which or whom the appeal is had, together with full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before any person whom the Court may nominate.

Sub-sec. 2. Such further evidence may be given, without special leave, upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

Sub-sec. 3. Upon appeals from a decree or judgment upon the merits at the trial or hearing of any action or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without the special leave of the Court.

Sec. 23. The Court shall have power to dismiss an appeal, or give any judgment, and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below, or to award restitution and payment of costs, or to make such further or other order as the case may require.

Sec. 24. The Court shall have power to make such order, as to the whole or any part of the costs of an appeal as may seem just.

Sec. 25. The powers in the three next preceding sections mentioned may be exercised by the Court, notwithstanding that the appeal is brought against part only of the judgment of the Court below; and such power may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from, or complained of the judgment.

*Judgment against one defendant. Practice on appeal by him, plaintiff claiming in the alternative against the other defendant.*

In *Purnell v. Great Western R'y Co.*, L. R. 1 Q. B. D. 636, Jessel, M. R., said:—"The action was brought by the plaintiff against the Great Western Railway Company and Harris, for an injury occasioned by the negligence of persons who were the servants either of the Great Western Railway Company or of Harris. The jury found in effect that at the time of the act they were the servants of the Company, and therefore found a verdict against the Company and in favour of Harris. The Company moved for a new trial before the Queen's Bench Division. The Company was directed by that Division to serve notice of the order upon the defendant Harris. When the order came in for argument, the Court being equally divided in opinion, one Judge being in favour of the Company, and the other in favour of the plaintiff, the order was discharged, and the Counsel for Harris of course was not called upon to argue, the decision being in his favour; at the same time it may be observed that the costs of attending on that occasion were refused to Harris. When the case came before this Court on appeal by the Company, the Court, think-



ing there was a serious question to be argued as to whether the persons who were guilty of the negligence were the servants of Harris, before proceeding to decide the question between the Company and the plaintiff, directed that notice of the appeal should be given by the plaintiff to Harris, so that he might shew cause why a new trial should not be had, and Harris has appeared under protest, and insisted that the Court of Appeal had no jurisdiction to make that order as to him, the four days having elapsed within which, as a matter of course, the order to shew cause why a new trial should not be had should have been moved, and it is insisted that this Court should not now entertain the application.

"I myself have no doubt as to the Jurisdiction of the Court; I think it is given in the plainest possible terms. But before considering what the Jurisdiction is, it is necessary to consider what the practice at Common Law was before the Judicature Act. It seems to be established by the two cases to which our attention has been directed, viz.: *Doe v. Martin*, 13 M. & W. 811; 14 L. J. Ex. 128, and *Belcher v. Magnay*, 13 M. & W. 815, n; 14 L. J. Ex. 305, that where a verdict has been found in favour of one defendant and against another, and the defendant against whom the verdict has been found shall move for a new trial, he was bound to serve a notice of the rule for a new trial on the defendant in whose favour the verdict was returned, and no new trial could be granted unless that proceeding was adopted. That seems to me a very reasonable rule and entirely coincides with the similar practice in the Courts of Equity.

"That being so in the present case, it appears to me the Railway Company did all they could be reasonably required to do; they obeyed the direction of the Court in serving a notice of the order on Harris, and therefore, it seems to me the only point now to be considered is, whether, Harris being present, a new trial should be granted.

"It is quite true there is no appeal by the plaintiff, nor is there any cross order moved for; and it is said that if the plaintiff anticipated the moving of the Court for a new trial by the defendant, against whom he had obtained a verdict, he should have moved for a cross order against the defendant, in whose favour the verdict had been found. But under the old practice the defendant who moved the rule was bound to serve notice of it on the other defendant. Therefore, as the plaintiff did not desire a new trial, and in the event of the defendant, who should move for an order obtaining one, the Court had full power to grant a new trial generally."

See also G. O. Ct. Appeal XVI, which provides that "a cross-appeal shall not under any circumstances be necessary, but if a respondent intends upon the hearing to contend that the decision should be varied he shall, with his reasons against the appeal, give notice of such contention to any parties who may be affected by such contention, and such notice shall concisely state the grounds of such contention in the same manner as reasons of appeal are stated."

**15.** The jurisdiction and power of the Court of Appeal, in respect of the said matters and all others, shall be and are subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

See Imp. Act of 1873, s. 19, first part.

### RULES OF LAW.

**16.** In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the Rules following:

See Imp. Act of 1873, s. 24; R. S. O., c. 49, ss. 4, 5.

The Administration of Justice Act (R. S. O., c. 49) provides (sec. 2), that the Courts of Law and Equity are to be auxiliary to each other. Under sec. 4 a purely

money demand might have been sued for at law, though the right was equitable only; and under sec. 5 the Court or Judge might in any action make such order or decree as equity required.

The rules set out in this section are to be in force and receive effect in all Courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. See sec. 80.

Mr. Arthur Wilson, treating of the effect of this and the following sub-sections, writes as follows:—"This and the next section undertake to deal with the long-standing anomaly to which so many palliations had from time to time been applied, but which had never been removed—by which different Courts recognized different rights and duties, applied different remedies to the same case, and in some cases even enforced rules of law actually in conflict with one another. The removal of the last mentioned defect, actual conflict of law, is provided for by Sec. 25. (See Ontario Judicature Act, sec. 17.) The rest of the matter is dealt with in the present section."

The provisions of this section may be shortly summarized thus:—

The plaintiff may assert an equitable claim in any Court.

The plaintiff may obtain an equitable remedy in any Court.

The defendant may raise any equitable answer or defence in any Court; that is to say, anything which would hitherto have been good by way of answer, if the suit had been brought in Chancery (Sub-s. 3), or would have afforded ground for an injunction, if the action had been brought at law, Sub-s. 6.

The defendant may assert, by way of counter-claim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross suit at law or in equity, Sub-s. 4.

The defendant may obtain relief relating to or connected with the original subject, if the action against other persons, whether already parties or not, *Ibid.*

All Courts are to recognize equitable rights incidentally appearing. (Sub-s. 5.)

No cause is to be restrained by injunction; but what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings (sub-s. 6), or, if more convenient, the action may be transferred to another Division, O. XLV.

Subject to these provisions, common law rights and duties are to be recognized, Sub-s. 7.

Every Court is to apply all appropriate remedies, and dispose of all matters in controversy, Sub-s. 8.

For definitions of "plaintiffs," "petitioner," "defendant," see sec. 91.

- (2) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right which heretofore could only have been given by a Court of Equity, the said Courts respectively, and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

See Imp. Act of 1873, s. 24, sub-s. 1.

As to the meaning of the words "plaintiff" and "petitioner," see sec. 91.

Courts of Equity will generally set aside, cancel, and direct to be delivered up, agreements and other instruments, however solemn in their form of operation, when they are voidable, and not merely void, under the following circumstances: first,



where there is actual fraud in the party defendant, in which the party plaintiff has not participated; secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein; thirdly, where there is a fraud against public policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand; and lastly, where there is a constructive fraud by both parties but they are not *in pari delicto*, Taylor Eq., Jur. s. 520. Equity will interfere to restrain an apprehended injury where it is clear that the Act intended to be committed would injure or destroy a clear legal right, *Herz v. Union Bank of London*, 2 Giff. 686; *Crompton v. Lee*, L. R. 19 Eq. 115.

- (3) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act.

See Imp. Act of 1873, s. 24, sub-sec. 2.

Where a defendant sets up facts in his statement of defence, which would in the Court of Chancery have entitled him to have an instrument set aside, the Court may, for the purpose of determining the action, treat it as set aside, *Mostyn v. West Mostyn Coal and Iron Company*, L. R. 1 C. P. D. 145.

Stipulations for commissions on receipt of rents, and conversion of arrears of interest into principal, inserted by a solicitor in a mortgage deed, prepared by himself, and insisted upon by him as the condition of any further allowance to his client, will not be allowed in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit. Upon a proper case for opening signed accounts, made by a mortgagor by his answer and evidence in a foreclosure suit in issue before the 2nd of November, 1875, the Court has power under the Imp. Act, 1873, s. 24, sub-ss. 2, 3 (Ontario Judicature Act, s. 16, sub-ss. 3, 4), to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counter-claim had been filed for the purpose, *Eyre v. Hughes*, L. R. 2 Ch. D. 148.

- (4) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof,

might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant.

See Imp. Act of 1873, s. 24, sub-s. 3.

A short resumé of the law, prior to this statute, may be useful.

The Common Law Procedure Act (Con. Stat. U. C., c. 22, s. 124) provided that—"Any defendant or the plaintiff in replevin in any cause, who, if judgment were obtained, would be entitled to relief against such judgment on equitable grounds, may plead the facts which entitle him to such relief by way of defence, and the said Courts shall receive such defence by way of plea; but such plea must begin with the words, 'for defence on equitable grounds,' or words to the like effect." Under the corresponding English Act, it was held that as there were no pleadings in ejectment, the section did not extend to that form of action, *Neave v. Avery*, 16 C. B. 328. The section was also confined to such equitable defences as would, if raised by bill in equity, have entitled the pleader to an absolute, perpetual and unconditional injunction. It was optional too, with the defendant, whether he would plead his equity or raise it by bill and stay the action by injunction, *Kingsford v. Swinford*, 5 Jur. N. S. 261. The limitations were removed by "The Administration of Justice Act of 1873." By sec. 3 of that Act "Any party to an action at law may, by plea or any subsequent pleading, set up facts which entitle him to relief upon equitable grounds, although such facts may not entitle such party to an absolute, perpetual and unconditional injunction in a Court of Equity, and although the opposite party may be entitled to some substantive relief as against the party setting up such facts." By sec. 4, defences upon equitable grounds may be raised in actions of ejectment, and by sec. 8—"For the purpose of carrying into effect the objects of this Act, and for causing complete and final justice to be done in all matters in question in any action at law, the Court or a Judge thereof, according to the circumstances of the case, may, at the trial or at any other stage of an action or other proceeding, pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require, and may make such rule or order as to adding third persons as parties to any proceeding, striking out parties, or treating parties named plaintiffs as defendants, or parties named defendants as plaintiffs, and as to costs, and may direct such inquiries to be made and accounts to be taken, as shall seem reasonable and just; and may as fully dispose of the rights and matters in question as a Court of Equity could do." In *St. Michael's College v. Merrick*, 1 App. R. 520, it was held that, although the Legislature used the identical words in which the judgment of the Courts was couched when deciding that the power to plead at law was confined, and extended the right to plead any equitable defence whatever, the language used was still permissive, and still left it optional with the parties to avail themselves of it or not. Does this option still exist? The language is still permissive, and it may be doubted whether sub-sec. 8 of the present section shews more clearly

than did the former sec. 8 the intention of the Legislature to compel the settlement of all matters in controversy in the first action. It may be said that the powers of the Courts are now identical. Was not that argued and held before? (See the judgment of Burton, J. A., in *St. Michael's College v. Merrick* (*ante*), at pp. 529 *et seq.*, and *Victoria Mutual Fire Insurance Company v. Bethune* (1 App. R. at pp. 422 *et seq.*). Sub-sec. 6 indeed provides that no cause or proceeding shall be restrained by injunction, and this may, practically, have the effect of compelling equitable defences to be pleaded, for if they be not pleaded judgment may be obtained and enforced at law (unless, indeed, the word "proceeding" does not extend to an execution). The judgment, following the former practice, would not be conclusive if the equitable defences were not raised (as to this, however, see *St. Michael's College v. Merrick* at p. 532), but if the means of restraining the enforcement of the judgment be taken away, is it not practically conclusive? Even this section (sub-sec. 6), however, uses the permissive "may" in providing for the raising of equitable defences, and although no injunction can be obtained, an order may be applied for staying the proceedings. See, however, *Garbutt v. Fawcus*, L. R. 1 Ch. D. 155, where it was held that a defendant in an action at law, having an equitable defence, should obtain from the Judge of the Common Law Division leave to plead that defence, and cannot obtain from a Judge of the Chancery Division a direction to stay proceedings in the Common Law Division; and this prevails whether the action at law was commenced before or after the Judicature Acts came into operation. An action pending in one Division will not be stayed by another Division or Judge, unless the defence is on grounds unconnected with the cause of action.

*By the Chancery Orders* (126), it was provided that "a defendant may claim, by answer, any relief against the plaintiff, which such defendant might claim by cross-bill." A cross-bill was a bill brought by a defendant against the plaintiff in another suit, (and, if necessary, other parties,) touching the same matter. It frequently happened that a complete decree could not be made without a cross-bill, or cross-bills to bring the whole matter in dispute completely before the Court. In all such cases it became necessary for some or one of the defendants to the original bill to file a bill against the plaintiff, and, if necessary, the other defendants to that bill, or some of them, and bring the litigated point properly before the Court, *Daniell, Chy. Prac.*, (5 Ed.) 1402.

*The present Act.*—Sub-s. 4 consists of two parts: (a) relief which may be given as against the plaintiff, (b) relief which may be given as against a co-defendant, or against some person not already a party to the suit. In the latter the relief is limited to relief "relating to or connected with the original subject of the cause or matter." In the former there is no express limitation. Can, then, a defendant, instead of raising a defence or, conjointly with his defence, set up a totally distinct cause of suit, and ask for relief? "Natural equity says that cross demands should compensate each other, by deducting the less sum from the greater; and that the difference is the only sum which can be justly due. But the Common Law refused to carry out this principle of justice, and held that where there were mutual debts unconnected they should not be set-off, but each must sue. The natural sense of mankind was first shocked at this in the case of bankrupts, and accordingly the Legislature interfered, and allowed a set-off at Common Law and a few other cases. (4 Anne, c. 17, s. 11; 2 Geo. II., c. 22, s. 13; 8 Geo. II., c. 24, s. 4.) The Court of Equity allowed set-off in some cases not within these Statutes, where although these debts are independent, yet there was mutual credit," *Snell's Eq.* 442-3. So, too, upon very slight evidence of an agreement, that the debts should be the subject of set-off, *Lundy v. McCulla*, 11 Gr. 368.

In order that one complete view may be given of the practice relating to this important feature of the new system, the rules affecting it are here given:—

Order XV., R. 3.—A defendant in an action may set-off or set up by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not.

(a) Such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim.

(b) But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

Order XVIII., R. 5. — Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

R. 6. Where any such person, as in the last preceding Rule mentioned, is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 5 in Appendix (B) hereto, or to the like effect.

R. 7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

R. 8. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

R. 9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff, or any other person named in manner aforesaid as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time within 3 weeks from the delivery of such statement of defence, apply to the Court or a Judge for an order that such counter-claim may be excluded; and the Court or a Judge may, on the hearing of such application, make such order as shall be just.

R. 10. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

In *Quin v. Hession* (40 L. T. N., S. 70), the action was for slander. The defendant delivered a defence and counter-claim, claiming damages from the plaintiff on account of slanderous words alleged to have been spoken on a distinct and prior occasion to that on which the words of which the plaintiff complained were uttered. On a motion to strike out the counter-claim, Pales, C. B., said:—"I am of opinion that, upon the true construction of the Judicature Act, and the rules for carrying it into effect, any claim of a defendant against a plaintiff, whether connected or disconnected with the original subject matter of the action can be made the subject of a counter-claim, and if it be embarrassing or inconvenient, the only remedy is by applying to strike it out. This opinion I ground upon the 3rd subsection of the 24th section of the Judicature Act (Cat. Act, s. 16, sub-s. 4); and the 22nd Schedule Rule' Eng. (Order XIX, r. 3; Ont. Order XV, r. 3). On reading the section of the Act it might at first sight appear that the relief against the plaintiff mentioned in that section as given to a defendant 'in respect of any legal estate, right or title claimed or asserted by him' was something connected with land, and if so we would have no jurisdiction to allow this counter-claim before us. But by Schedule Rule 22 (Eng. Order XIX, r. 3; Ont. Order XV, r. 3), which is part of the Act, the remedy is extended and a general right is given to a defendant to counter-claim against a plaintiff. It has been contended that these words, 'relating to or connected with the original subject of the cause or matter,' qualify the nature of the relief which may be sought by counter-claim by a defendant against a plaintiff alone, as well as against a plaintiff 'and any other person;' and in support of this contention the case before Hall, V. C., which I have mentioned (*Padwick v. Scott*, L. R. 2 Ch. D. 736), and that before the Master of the Rolls (*Naylor v. Farrar*, W. N. (1878) 187) have been cited. I think, however, that the words qualify only that portion of the section with which they are in immediate connection, namely, a counter-claim which seeks relief against a third party as well as against the plaintiff. This construction is strengthened by Schedule R, 22 (Eng. Order XIX, r. 3; Ont. Order, XV, r. 3), than which it is impossible to conceive wider phraseology. Then comes the second question, whether in the present case the counter-claim is of such a nature that it cannot conveniently be disposed of at the same time as the original claim. On this point

I am of opinion that there is nothing to hinder both being disposed of at the same time, but, on the contrary, that it will be doing complete justice to both parties to have them tried together."

*Cappeleus v. Brown*, W. N. (1875) 231, Quain, J., said: "That the counter-claim here set up is brought upon an earlier contract than the original action may be a very good defence to it, but is not a sufficient reason for refusing to allow it. I have a discretion as to allowing the defendant to set up a counter-claim; and may strike it out, after it has been set up, when I think it ought not to be allowed. For instance, in an action for assault and battery, I would not allow a counter-claim to be set up for seduction of defendant's daughter. It was the scandal of the past procedure that A might have a liquidated claim against B, and B a claim for damages against A, and yet B could not set up his claim in an action by A, but must bring a fresh one. Pleading a counter-claim under circumstances such as the present, I look upon as analogous to pleading a defence arising after action brought, and therefore it comes within the principle of Order XX, r. 3, (Ont. O., XVI, r. 7.) I order that defendant be at liberty to deliver his counter-claim; and that the plaintiff have a week to consider whether he will continue his action. If he elect to discontinue, all the costs to be his."

*But where the counter-claim is against a third party*, as well as the plaintiff it must relate to, or be connected with, the original subject of the cause or matter (Quin v. Hession *ante*; Padwick v. Scott, L. R. 2 Ch. D. 736; Harris v. Gamble, L. R. 6 Ch. D. 748; but see remarks in Cunningham & Mattinson's Precedents of Pleading, p. 76).

*Care must be taken to distinguish between cases in which a counter-claim may be filed and cases in which it is desired only so far to bring a third party into the action as that he may be bound by the result* under O. XII, rr. 19-25. In the *Central African Trading Company (Limited) v. Grove*, 45 L. J. Ex. 510, in answer to a claim by the plaintiff Company for money lent, the defendant set up a counter-claim against the Company and one T., stating that T. agreed to purchase a business from the defendant on the terms that T. should obtain for defendant an indemnity from certain creditors who had charges upon the good will and effects, and also should pay certain of defendant's debts for him, and should pay defendant a share of profits and an annuity; that the business was accordingly transferred to T., who, after performing a small part only of the consideration, formed the plaintiff Company, almost all the shares being held by T. and his relatives; that the Company took over the business, and adopted the agreement, but although they performed part, they failed to perform all the terms of it. Defendant claimed damages against the Company for their breach; that they might be ordered to obtain an indemnity and discharge from the creditors; payment by them of the unpaid portion of the annuity, and, in the alternative damages against T. for his breach of the agreement. Bramwell, L. J., said: "I am of opinion that this appeal should be dismissed. I may say that I entirely agree with the Queen's Bench Division in wishing that the whole of these matters could be tried together, but I think upon consideration that cannot be done. It is not within the rule, and not intended that any rule should comprehend it. There seems to be this dilemma in the matter; the counter-claim either states that there was a novation of the contract or it does not; if it does, then T., on the face of the counter-claim is not a party to the contract; if it does not, then defendant's remedy is against T. and not against the Company. All that he states in his counter-claim is, 'It may be that I owe the plaintiffs the money, but if so, I have a remedy over against T.' But that case is within Order XVI. (Ont. O., XII.) If there had been a distinct allegation that there was a novation of the contract, then T. would not be wanted in the action at all. If, on the other hand, the allegation had been that there was no novation, but an alternative claim for damages against T., then the case is within Order XVI. (Ont. O., XII.), and the claim is not the subject matter of a counter-claim. The only misgiving I have had is whether the defendant being in an uncertainty as to whether there has been a novation or not could make any difference. But that cannot really matter, because, if he had been certain, he would have no right to make T. a party to the counter-claim; he cannot have a right because he is not certain."

*Counter-claim or defence.* On the other hand, too, care must be taken to distinguish between cases in which it is necessary to set up a counter-claim, and where it is sufficient merely to set up the facts as a defence. Sub-sec. 4 gives to the Court power to grant to a defendant all such relief "as such defendant shall have properly claimed by his pleading." By O., XV., r. 3, a counter-claim "shall state specifically the relief" claimed either simply or in the alternative, and may also ask

for general  
equitable  
as the C  
what ca  
what co  
Hughes  
ant des  
entitled  
that thi  
and tha  
relief co  
down in  
aid of th  
when he  
him, it  
the defe  
the Cou  
(Ed. p.

Ques  
defence  
is not a  
cient n  
Sharp,  
49 L. J.

It is  
has been

Coun  
defence  
to the w  
with mu  
defenda  
sets out  
must be  
Iron Co

Rect

Mus  
action i  
the tim  
themsel  
the inte  
not bec  
order w  
count o  
which t  
proceed  
reply i  
respect  
cordand  
he restr  
in the  
C. P. I  
plaintif  
v. Raw

A de  
mortgag  
security  
of the J  
that ju  
could h  
Bench  
ham Es  
Insuran  
rules up

for general relief. Under sub-sec. 3 (above) if a defendant "alleges any ground of equitable defence," the Courts shall give "the same effect by way of defence, . . . as the Court of Chancery ought to have given." The deciding point then may be in what cases under the old practice had a cross bill to be filed in Chancery, and in what could the defence have been raised by answer in the same suit. In *Eyre v. Hughes*, L. R. 2 Ch. D. 148, a mortgagee filed a bill for foreclosure. The defendant desired to open certain signed accounts and set up certain facts sufficient to entitle him to such relief, but did not plead them as a counter-claim. It was argued that this was relief which could formerly have been obtained only in a cross suit, and that it was inadmissible except by way of counter-claim. The Court held that relief could formerly have been given without a cross bill. The old practice is laid down in Daniell's Chancery Practice, as follows: "Where a defendant seeks the aid of the Court for the purpose of enforcing his right, he must file a cross-bill; but when he relies upon his rights, merely by way of defence to the relief sought against him, it is not necessary to do so. In a suit for specific performance, however, if the defendant proves an agreement different from that insisted on by the plaintiff, the Court, without a cross-bill being filed, may decree the same to be executed." (Ed. p.)

Questions between co-defendants may be raised by a pleading which states both a defence as against the plaintiff and a claim against a co-defendant, but such pleading is not a counter-claim and should not be so intitled. It will however be a sufficient notice under O. XII., r. 19, (see notes to that order). See also *McLay v. Sharp*, W. N. (1877), 216; *Bagot v. Easton*, L. R. 11 Ch. D. 392; *Butler v. Butler*, 49 L. J. Chy., N. S. 742.

It is proposed here to give a short summary of the cases in which a counter-claim has been allowed or disallowed;

*Counter-claim not equal to plaintiff's claim.* "I also agree that the statement of defence is good by way of counter-claim, though it may not amount to an answer to the whole of the claim. The effect of the recent legislation has been to do away with much of the former technicality with regard to pleadings, and to enable the defendant to make any claim in his defence in the nature of a cross action. If he sets out that which would be an answer to part of the claim only, such a statement must be allowed and will not be demurrable," *Mostyn v. West Mostyn Coal and Iron Co.*, L. R. 1 C. P. D. at p. 153, *per* Archibald, J.

*Rectifying or setting aside a deed sued upon, (Ib).*

*Must be in respect of a matter which would be the proper subject of an action.* To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their statement of defence sought to avail themselves either by way of set-off or of counter-claim, of a debt due to them from the intestate as one of several makers of a promissory note for £1,000 which did not become due until after the intestate's death. Reply, that before action, an order was made in an administration suit in the Chancery Division, to take an account of the debts and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice; and that equity would restrain any proceedings on the note until the account had been taken. On demurrer to this reply:—Held, upon the authority of *Rees v. Watts* (11 Ex. 410), that the claim in respect of the promissory note could not be relied on as a set-off; and that, in accordance with the practice in Equity, the defendants must, under the circumstances, be restrained from setting it up by way of counter-claim, and be left to prove for it in the administration suit, *Newell v. The National Provincial Bank*, L. R. 1 C. P. D. 496; so also a set-off cannot be maintained of a debt contracted by the plaintiff during infancy and not ratified by him in writing after full age, *Rawley v. Rawley*, L. R. 1 Q. B. 460.

A defendant mortgagee, in an action in the Chancery Division to set aside his mortgage, commenced an action in the Queen's Bench Division to enforce his security and obtained judgment, which was not to be enforced without the leave of the Judge of the Chancery Division. He then counter-claimed for leave to enforce that judgment, or in the alternative for judgment, for what was due to him in respect of the mortgage. On motion to exclude the counter-claim:—Held, that, as no action could have been brought when judgment had already been obtained in the Queen's Bench Division, the counter-claim was wrong and must be struck out, *Birmingham Estates Company v. Smith*, L. R. 13 Ch. D. 506. In *Pellias v. Neptune Marine Insurance Company*, L. R. 5 C. P. D. 34, *Bramwell, J.*, said: "The orders and rules under the Supreme Court of Judicature Acts, 1873, 1875, are matters of pro-



cedure and are not intended to alter the law or the rights of the parties. If before those statutes the plaintiffs would have been entitled to maintain the action for the full amount from which the defendants seek to deduct £40, the plaintiff can maintain it now."

*Separate counter-claims against joint plaintiffs.*—Two railway companies, having, as joint lessees of a railway, sued for statutory tolls, the defendant set up against each company separate counter-claims for damages in respect of delay in the delivery of goods. The plaintiffs applied to strike out the counter-claims, but no reasons were alleged why they could not be conveniently disposed of in the action:—Held, that the counter-claims ought not to be struck out. *The Manchester, Sheffield and Lincolnshire Railway Company, and the London and Northwestern Railway Company v. Brooks*, L. R. 2 Ex. D. 243.

*Against plaintiff in same right.*—A defendant must not set up by way of counter-claim against the claim of a plaintiff, suing only in a distinct personal character, claims against him personally and also as an executor. "I should understand that the defendant in any action might set-off by way of counter-claim, any claim against the plaintiff, in the same character in which he sues himself," per Lindley, J., in *Macdonold v. Carrington*, L. R. 4 C. P. D. 28, 38; see also *Newell v. The National Prov. Bank*, L. R. 1 C. P. D. 496 (*ante*).

*Plaintiff suing as assignee of a debt.*—The statement of claim alleged that the plaintiff sued as assignee, by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counter-claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—Held, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly, *Young v. Kitchen*, L. R. 3 Ex. D. 127.

*Claim for account; counter-claim for specific performance.* First mortgagee being sole defendant to an action by second mortgagees for an account of what was due to them respectively, and to have a contract of sale entered into by the first mortgagee completed, and the sale moneys applied accordingly, made the purchaser co-defendant with the plaintiffs to a counter-claim for specific performance by the purchaser with the concurrence of the plaintiffs, alleging that their concurrence was a term of the contract, and that the purchaser refused to complete without it. The defence and counter-claim having been served on the purchaser, he moved to have so much of the counter-claim as affected him excluded:—Held that, there being a question between the defendant and the plaintiffs, "along with" the purchaser which the defendant was entitled to raise by cross-action, the purchaser was properly made a defendant to the counter-claim, and the motion refused with costs accordingly, *Dear v. Swarder*; *Swarder v. Dear*, L. R. 4 Ch. D. 476.

*Married woman defendant.*—To an action by executors for the purpose of charging a married woman's separate estate with a debt to their testator contracted on the faith of such separate estate, the husband who had been made a defendant, and his wife raised a counter-claim for money belonging to the wife, not part of her separate estate, and for certain chattels in the possession of the testator at his death, which it was alleged were the property of the husband:—Held, on motion, that the claim to the chattels and money was a proper subject of counter-claim, *Hodson v. Mochi*, L. R. 8 Ch. D. 569.

*Must seek relief against plaintiff.*—A counter-claim must claim relief against the plaintiff, and he must be made a party to it. The relief claimed by a counter-claim must relate to the specific subject matter of the action. Where a counter-claim sought indemnity:—Held, that the indemnity must be confined to the property which was the subject of the action, *Harris v. Gamble*, L. R. 6 Ch. D. 748.

T. contracted with the H. Gas Company to erect certain buildings for a certain sum. By the terms of the contract the buildings were to be erected to the satisfaction of the company's engineer, and if the work did not proceed to his satisfaction the company were empowered to take it out of T's hands and finish it themselves, charging T. any additional costs that might thereby be caused. R. gave a bond to the company for £200 for the due performance by T. of the contract. The work not progressing to the engineer's satisfaction, it was taken out of T's hands

ties. If before the action for the plaintiff can

panies, having, set up against delay in the claims, but no in the action:—*Re Manchester, Northwestern*

vay of counter- onal character, understand that him, any claim *per Lindley, J., Newell v. The*

leged that the to the assignor ff and counter- the assignor to the defendant llegal breaches itled to recover ff or deduction the non-perfor- eference must be

mortgagee being of what was due into by the first e the purchaser orformance by the ir concurrence lete without it. or, he moved to eld that, there "the purchaser haser was pro- osed with costs 5.

urpose of charg- r contracted on defendant, and not part of her testator at his eld, on motion, counter-claim,

elief against the a counter-claim a counter-claim o the property D. 748.

gs for a certain ed to the satis- to his satisfac- finish it them- ed. R. gave a contract. The t of T's hands

by the company, whereupon T. brought an action. The company put in a statement of defence, alleging (*inter alia*) that the work had not progressed to the satisfaction of their engineer, and that they had thereupon completed it themselves at a cost of £254 14s. 9d. more than would have been incurred if it had been finished by the plaintiff, and by way of counter-claim, repeating the above allegations, they claimed from R., by virtue of the bond given by him for the due performance by T. of the contract, the sum of £200 in part satisfaction of the said sum of £254 14s. 9d.:—Held, by the Exchequer Division, (Cleasby, B., and Hawkins, J.,) that a counter-claim should ask relief against the plaintiff alone, or against the plaintiff jointly with another person, and the counter-claim here not being a joint one against T., the plaintiff, and R., could not stand. It was no counter-claim against T., and there could not be one against R. alone, *Turner v. Hednesford Gas Company*, 38 L. T. 37. In appeal, (L. R. 3 Ex. D. 145,) however, this decision was reversed, Bramwell, L. J., said: "I think the true meaning is that if the defendant could have made the plaintiff and the third party defendants in any action the counter-claim is valid. Could the defendants have brought an action against R. and the plaintiff? I am of opinion they could. The relief that the defendants claim against R. is indemnity for the breach by the plaintiff of his contract to the extent of £200, but the relief that is sought is on a contract between the defendants and R.; it is not a joint, but a several, liability. If the obligation, however, had been created between the parties in one instrument, limiting R.'s liability to £200, in that case it would have been a joint contract, and I think that the substance of the actual contract between the parties is the same, unless we hold that the amount sought to be recovered is an independent liability arising on a different contract, the present defendants would be entitled to join R. as a defendant in an action. As they can do that, I think that R. can be joined with the plaintiff in the counter-claim."

*Inconsistent Reliefs.*—In *Evans v. Buck*, *Buck v. Evans*, L. R. 4 Ch. D. 432, Jessel, M. R., said:—"Under the old practice no man could file a bill for alternative relief founded on inconsistent allegations. This counter-claim says, in effect, that the settlement is right in form and in substance, but if the Court should be of opinion that it is not, then it claims that it may be rectified, and for that purpose makes a person a party who was not a party to the original action. That person demurs to the counter-claim, and says, 'If you fail to establish a case for rectifying the deed, you have no reason for bringing me into an action with which I have no concern.' The same rules of pleading which prevailed under the old law prevail now, unless there is anything in the Judicature Act or in the new Orders or Rules which prevents it. I am referred in support of the counter-claim to Rules of Court, 1875, Order XVI., rule 3, (Ont. O., XII., rule 3,) which provides that 'all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, but it does not say in an inconsistent alternative. The sixth rule provides that when a plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action. It is clear that these rules do not in express terms apply to a counter-claim, nor can they be taken to over-rule the old practice of the Court, and considering the terms of Order XXII., rule 9, (Ont. O., XVIII., r. 9) I am of opinion that such a form of litigation ought not to be allowed. The demurrer must be allowed with costs." But the right to ask for inconsistent reliefs under the new practice has since this decision been much discussed, and it may be urged that if (as has been held) a plaintiff can claim in inconsistent alternatives and a defendant counter-claim against a plaintiff in the same way, there should be a similar mode of claim allowed in the case of a counter-claim where a third party is made a defendant to it, see *Child v. Stenning*, L. R. Ch. D. 413, and O. XII., rr. 1, 3, and notes.

*Third party brought in by counter-claim.*—A person named in a defence as a party to a counter-claim thereby made, cannot counter-claim against the defendant, *Street v. Gover*, *Gover v. Street*, L. R., 2 Q. B. D. 498. But a person made a party by a notice under O. XII., R.R. 19-25, can give a similar notice to and bring in another, *Fowler v. Knoop* and *The London Banking Association*, W.N. (1877), 68, but see notes to O. XII., R. 19.

*Matter arising after action.*—When a defendant delivers a counter-claim, any damages thereby claimed must be limited to the date when the writ was issued, *Original Hartlepool Collieries Company v. Gibb*, L. R. 5 Ch. D. 713; but see *Ellis v. Munson*, 35 L. T. N. S. 585, where it was held that a counter-claim founded on



facts which have arisen since the action was brought must be pleaded as so arising, so that the plaintiff may be able to confess the plea; and if it is not so pleaded the plaintiff should take out a summons to strike it out, unless it be amended. And see *Lees v. Patterson*, L. R. 7 Ch. D. 866; *Beddall v. Maitland*, W. N. (1881) 33.

*Form of counter-claim.*—(See O. XVIII., R. 5.) The same rules apply to a counter-claim as to a statement of claim; therefore the facts on which the defendant relies must be stated in the body of his counter-claim, and cannot be inferred from the plaintiff's statement, and, if the defendant wants alternative or general relief the counter-claim must ask it. (*Halloway v. York*, 25 W. R., 627.) A counter-claim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed. It is not sufficient that the facts relied upon appear in the statement of defence, even though that and the counter-claim form one continuous document. A counter-claim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused, *Crowe v. Barnicot*, L. R. 6 Ch. D. 753. A writ of *ne exeat* against a defendant was obtained by the plaintiff immediately after the commencement of the action. The defendant was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence the defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim. The defendant made the allegation that the writ had been improperly issued, and the claim for damages, in one paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-claim:—Held, that the pleading was good as a counter-claim, *Crowe v. Barnicot*, distinguished, L. R. 6 Ch. D. 753; *Lees v. Patterson*, L. R. 7 Ch. D. 866.

Messrs. Cunningham and Mattinson summarize these cases as follows:—"The combined effect of these cases and Rules 3 and 10 of Order XIX. seems to be that the paragraphs which make up the counter-claim may be numbered on consecutively after those which constitute the defence, and although it is not absolutely essential that the commencement of the counter-claim should be distinguished from the end of the defence in any marked way, yet it is necessary that there should appear in the body of the counter-claim itself all the facts on which the defendant relies in support of his counter-claim; and it is not enough that the necessary facts can be found scattered throughout the defence and the counter-claim. It is submitted, however, that there is no objection to an express incorporation by appropriate words of paragraphs to be found in the defence into the counter-claim, and that when this is done the effect is that the allegations of fact set out in the incorporated paragraphs must be taken as set out in the body of the counter-claim within the meaning of the Rule; (see page 82)." Since the publication of this work the case of *Birmingham Estates Company v. Smith*, L. R. 13 Ch. D. 506, has been determined. Jessel, M. R., there said: "Then the plaintiff company object to the counter-claim, not because this is not a proper subject of counter-claim, which is a new objection, but because they say the defendant has no right to such relief, and he has not properly referred to the facts. Now, I did not decide in *Halloway v. York*, 25 W. R. 627, that a counter-claim should do any more than state the facts properly on which the counter-claim was founded. I did not decide that they were to be stated all over again. A defendant bringing in a counter-claim may say, 'I rely on the facts stated in the 3rd, 4th, and 5th paragraphs of the statement of claim, and the 7th, 9th, and 11th paragraphs of the statement of defence.' He need not print them all over again; it is quite enough if he refer to them, and thereupon counter-claims. That is what the defendant has done. He refers to 'the indenture of the 26th of June, 1876, in the pleading mentioned,' and to certain paragraphs in the statement of defence, which is a very good and cheap way of stating his case—much better than setting it all out—and then he counter-claims in the alternative for what he would have certainly been entitled to if he had not got judgment in the Common Law action, namely, for the money due to him under the indenture."

It must be noted, however, in this connection, that in Ontario there is no rule similar to the English rule 10 of O. XIX. (see *ante*), which provides that "where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim he shall in his statement of defence state specifically that he does so by way of set-off or counter-claim."

*Form—Style of cause.*—In Form 67 the style is given thus:—

Between A. B., Plaintiff,

and

C. D., Defendant.

(By original action.)

And Between C. D., Plaintiff,  
and  
A. B., Defendant.  
(By counter-claim.)

O. XVIII., r. 5, directs that where a defendant sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons, he shall add to the title of his defence a further title, etc. Where no "other person" is brought in by the counter-claim it has been said by Quain, J., in *Williams v. Wright*, W. N. (1875) 232, to be utterly wrong to add a further title. "The new procedure recognizes the party setting up a counter-claim in no other light than as a defendant. The heading of the Liverpool form is simply absurd." But where all the issues raised on a counter-claim were raised on the claim the plaintiff was not allowed to put in evidence after the plaintiff's evidence was closed, *Green v. Sevin*, 49 L. J. Ch. (N.S.) 166.

*Practice—Application to strike out counter-claim.*—An application to strike out a counter-claim on the ground that it cannot conveniently be tried in the action is a Court motion, *Naylor v. Farrer*, W. N. (1878) 187; but see notes to O. IV., r. 1 (a).

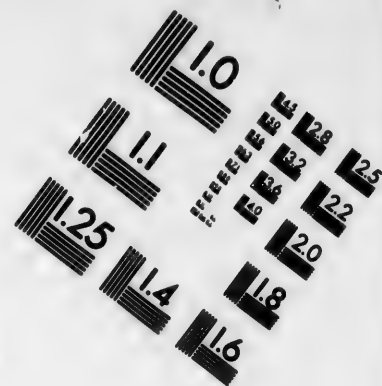
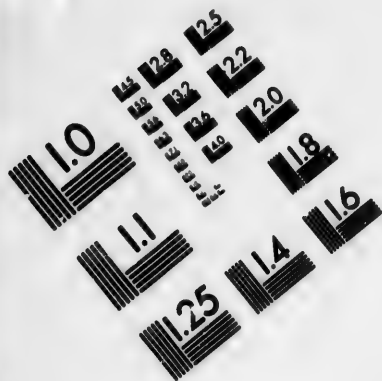
*Practice—Order of Examination of Witnesses at trial.*—The defendant in an action for a legacy sought a set-off by counter-claim, and raised issues not involved in the claim and defence. He was not allowed in cross-examination of the plaintiff to ask questions relevant only to the issues upon the counter-claim, but was allowed to recall him as his own witness, *Re Woodfine*, *Thompson v. Woodfine*, 47 L. J. N. S. Ch. 832.

*Practice—Disposition of counter-claim where plaintiff does not prosecute his claim.*—An order will not be made upon a counter-claim until the original claim has been dealt with. Therefore, where in answer to a statement of claim, a defence and counter-claim had been delivered, and some months after the expiration of the period allowed to the plaintiff for replying, a motion was made "for a decree according to the prayer of the counter-claim," the motion was dismissed. The proper course to adopt in such a case, where there is undue delay on the part of the plaintiff, is to give notice of motion to dismiss the original action for want of prosecution, and for judgment in the counter-claim, *Rolfe v. McLaren*, L. R. 3 Ch. D. 106, followed in *Aitkin v. Dunbar*, 46 L. J. Ch. 489.

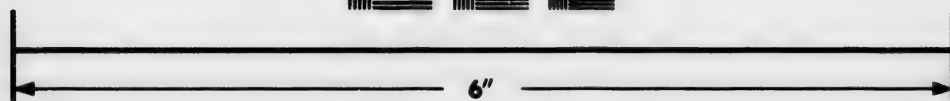
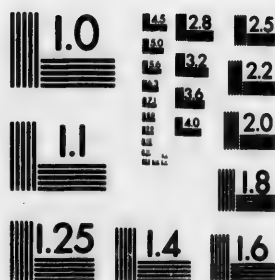
*Practice—Leave to file after time for pleading elapsed.*—Where the defendant in a foreclosure suit obtained an order for leave to file a counter-claim by way of set-off, and through the negligence of his solicitor no counter-claim was delivered, and a decree of foreclosure was made in his absence, an application more than six months afterwards for leave to file the counter-claim was refused on the ground of delay, *Wilkins v. Bedford*, 35 L. T. 622; but see *Evans v. Gann*, W. N. (1875) 199, and see as to negligence of solicitor as a ground for relief cases collected in note to sec. 38.

*Practice—Judgment—Costs.*—In an action tried by a jury, in which the plaintiff proves a claim, but a counter-claim of less amount is proved by the defendant, the plaintiff recovers judgment for the balance only, and if no order as to costs is made, the plaintiff's right to recover costs under the County Court Act, 1867, and Order LV. (Ont., O. L.), of the Judicature Act, must be decided with reference to that balance, and not to the amount of the claim proved, *Staples v. Young*, L. R. 2 Ex. D. 324. The County Court Act, 1867, s. 5, does not apply to counter-claims, so that when the plaintiff proved a claim for £40, and the defendant a counter-claim for £10, the defendant, in the absence of any order as to costs, was held entitled to the costs of proving his counter-claim, and of the issues so far as they related thereto, *Blake v. Appleyard*, L. R. 3 Ex. D. 195. The plaintiff claimed a balance of £114 8s., and the defendant established a counter-claim to the extent of £109 16s., whereupon the Judge directed the jury (as the result of their answers to certain questions submitted to them) to find a verdict for the plaintiff for the balance, £4 12s., and no order was made as to costs. The direction of the Judge was not questioned; the Court refused to alter the findings of the jury (the Judge being unable to do so), for the purpose of giving the defendant costs upon his counter-claim, (*Staples v. Young*, L. R. 2 Ex. D. 324; and *Blake v. Appleyard*, L. R. 3 Ex. D. 195, considered;) *Potter v. Chambers*, L. R. 4 C. P. D. 69.

*Costs.*—Where the plaintiff's claim and defendant's counter-claim are both dismissed with costs the plaintiff is to pay to the defendant the general costs of the action, and the defendant is to pay to the plaintiff only the amount by which the



# IMAGE EVALUATION TEST TARGET (MT-3)



Photographic  
Sciences  
Corporation

22 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4303



costs have been increased by reason of the counter-claim, *Saner v. Bilton*, 11 Ch. D. 416. The Taxing Masters, upon a reference to them, concurred in the following opinion:—"As this practice is introduced by the Judicature Act, this is an entirely new question. It is a long settled practice in Chancery that when a plaintiff institutes a suit for two objects, and succeeds upon one and fails on the other, the costs are apportioned thus: all the pleadings which apply exclusively to one object are considered costs relating to that, and the costs of so much of the pleadings as is common to both are apportioned between the two, and so are the general costs, such as a term fee; see *Leighington v. Grant*, 1 Beav. 228). The mode of apportionment sanctioned in that case is complicated, and need not be considered. The objectant does not complain of this case of the mode of apportionment, but of any apportionment being made. I had lately to consider this question, and came to the conclusion that the above rule as to apportionment does not apply to this case. This is not a partial failure on the part of the plaintiff, but entire failure, and consequently there is no settled practice upon the point. I however, after much consideration, considered that where the plaintiff succeeds in all that he claims, he is, notwithstanding that the defendant succeeds on a counter-claim, entitled to his full costs, except in so far as they are occasioned or increased by the counter-claim, and so if the plaintiff's action is dismissed with costs, the defendant is entitled to full costs against the plaintiff, except such additional costs as are occasioned by the counter-claim. The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the Common Law Masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions. The proceeding is analogous to the old practice of bill and cross-bill, but as these were distinct suits, and full costs allowed in both, there was no apportionment. There were three ways of taking the evidence: First, it might be taken in each suit; Secondly, the evidence might be taken in the one first at issue, and then an order obtained in the other to read it, with such further evidence as might be necessary; Thirdly, the evidence might, by arrangement or order, be taken in both suits. In the two first cases the proceedings in each suit would be allowed as costs in the suit in which they were taken; in the third case only there would be an apportionment. The result is, that in my opinion, in the case under consideration, there ought not to be any apportionment, and the objection should be allowed, but being an undecided question, it is for the Court to settle the practice." See also as to costs, *Potter v. Chambers*, L. R. 4 C. P. D. 69, and cases there discussed; *Davidson v. Gray*, 40 L. T. N. S. 192; *Cole v. Frith*, *Id.* 851; *Halliman v. Price*, 27 W. R. 490; *Mason v. Brentini*, L. R. 15 Ch. D. 287; *Beddall v. Maitland*, W. N. (1881) 43; *Baines v. Bromley*, L. R. 6 Q. B., C. P. & Ex. D. 197.

A claim and a counter-claim were both dismissed with costs. The taxing-master taxed the costs of the claim at £350, and gave £10 10s., as the costs of the counter-claim. The plaintiff took out a summons to review the taxation, on the ground that such of the costs of the claim as were common to both ought to be apportioned. *Malins v. C.*, was of opinion that the principle adopted by the taxing-master was right. The costs had not been increased by the counter-claim, and the plaintiff had not taken in any bill of costs occasioned by the counter-claim. The plaintiff must pay all the costs of the claim, and the £10 10s. allowed by the Master would be deducted, *Mason v. Brentini*, W. N. (1880) 107; affirmed in appeal, W. N. (1880) 144.

*Conveniently disposed of in the pending action.*—Under O. XV., R. 3 (b), if, in the opinion of the Court or Judge, a set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, permission may be refused to the defendant to avail himself thereof, and see O. XVIII., r. 9.

*Atwood v. Miller*, W. N. (1876) 11, was an action for rent, in which the defendant set-off the price of butcher's meat delivered, and had also a counter-claim for damages as tenant from year to year of the plaintiff, and for specific performance of an agreement to grant a lease. The Master had refused to strike out the counter-claim, and that decision was now appealed against. *Lindley, J.*: "At first sight it appeared doubtful whether the defendant could conveniently make both these claims together, and I was inclined to think that the claim for specific performance should be postponed, and tried separately. But I do not think that is necessary. I cannot hold that this counter-claim is sufficiently embarrassing to be struck out, and I think if I were to do so, I should be acting against the spirit of the Act."

*Bartholomew v. Rawlings*, W. N. (1876) 56, was an action brought to recover the

balance of money due on the sale of a public-house. It was desired to set up a counter-claim for the return of money paid as deposit on false representations alleged to have been made by Rawlings and one Smith; and for this purpose an application had been made to Master Bennett to join Smith as a co-defendant to the counter-claim, which was refused. That decision was now appealed against. Archibald, J.: "There is no doubt whatever that a defendant is entitled to set up any counter-claim that is not so incongruous as to be incapable of being conveniently tried with the original claim. I think a claim for the return of deposit money on the ground of fraud may be very conveniently tried in an action for the balance of purchase money on a sale, when the whole defence to the action is on the ground of fraudulent representation by the agent. I cannot say that these claims are of such an incongruous kind as to be unfit to be tried together. I regret that there may be some delay in the trial of the action, owing to the joinder of Smith, but that cannot be avoided."

In *Naylor v. Farrer*, 26 W. R. 809, Jessel, M. R., said that, in his opinion, under Order XIX., r. 3, (Ont., O. XV., r. 3,) defendant might set up any number of counter-claims. There was no limit laid down in that rule either to their number or nature, but it was left to the discretion of the Court or a Judge to do so, otherwise fifty causes of action of the most diverse nature might be joined together and set up, and witnesses of all kinds called in support of each. How would it be possible for the Court to try all these in one action? There must be some limit to the character of the claim set up. Suppose, for instance, an action for account brought by a surviving partner against the widow, who was also the executrix of the other, to which the widow set up a counter-claim for damages for breach of promise of marriage, could that be said to be a counter-claim which could be conveniently disposed of in the pending action? It was impossible. The Judge must exercise the discretion given to him by the Rule, in allowing or rejecting a counter-claim. In the present case, if the counter-claim were allowed, the plaintiff would have to put in a special reply. The action, as it stood, was for dissolution of partnership. The defendant denied the partnership, that was a simple issue, partnership or no partnership. Then the first two paragraphs of the counter-claim were not complained of, but the third went on to an entirely new cause of action. There were, therefore, two claims for remuneration set up by the defendant; one for the completion of the buildings, and the other for instructing solicitors and expenses in bringing actions; both were totally unconnected with the partnership, the subject of the plaintiff's claim. In his Lordship's opinion they could not be conveniently disposed of as a counter-claim, but were fit subjects for a cross-action. No injustice would be done to the defendant by striking out the counter-claim, because his Lordship would not be allowing the plaintiff, as in some cases, to get money from the defendant which he might not be entitled to, and which the defendant might not afford to spare; for the defendant would be able to get his money in the cross-action before the plaintiff, who would only get an order for taking accounts, could get any order for payment in the present action.

*Nicholson v. Jackson*, W. N. (1876) p. 38, was an application to strike out a counter-claim in the action, which was for libel. The alleged libel was contained in a circular letter published by the defendant among the shareholders of the Hanne Colliery Company (Limited). The plaintiff was one of the directors of the Company, who were charged in the letter with conspiracy and fraud. The defence was that the communications were privileged and there was a counter-claim for damages for loss sustained in respect of shares bought on false representations. Lindley, J.:—"This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims. Order to strike out counter-claim, without prejudice to any action the defendant may bring, and on the terms that the plaintiff in this action shall not issue execution on any judgment, he may obtain, without leave of a Court or a Judge, costs in the cause."

*Huggons v. Tweed*, L. R. 10 Ch. D. 359 (in appeal). The executors of M., a holder of debentures of a Company to the amount of £2,000, commenced an action to have the trusts of a deed, for securing payment of the debentures of the company carried into execution. The company delivered a defence and counter-claim. By the defence they alleged that an amount exceeding £2,000 was, under the circumstances mentioned in the counter-claim, due from M. to the company, and claimed a set-off. By the counter-claim they alleged that M. had been a director and promoter of the company, and while filling those characters had joined with other persons in selling an estate to the company at a profit, concealing the fact of his interest in



the estate, and that he had received more than £2,000 as his share of the profit of the transaction. The counter-claim asked that the executors might be ordered to pay to the company the share of profit which M. had received, and also the remainder of the profit which, in breach of his duty as a director, he had allowed to be received by the other vendors. The plaintiffs applied to have the counter-claim excluded on the ground that it could not be conveniently disposed of in the present action, and ought to be tried in an independent proceeding. The application having been refused by Hall, V. C., the plaintiffs appealed:—Held, that although, taking Order XIX., Rule 3, (Ont., O. XV., R. 3,) and Order XXII., Rule 9, (Ont. O. XVIII., R. 9,) together, the question whether a counter-claim shall be excluded is not so entirely in the discretion of the Judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with by the Court of Appeal, except in a very strong case, and that in the present case this discretion had been rightly exercised, see also *Quin v. Hessin*, 40 L. T. N. S. 70 (*ante*); *Wavell v. National Provincial Bank of England*, W. N. (1876) 7; *Lee v. Colyer*, *ib.*, 8; *Macdonald v. Bode*, *ib.* 23.)

*Form of Order.*—Under O. XV., r. 3 (*b*), the Court or a Judge may “refuse permission to the defendant to avail himself” of his counter-claim. Under O. XVIII., r. 9, application may be made “for an order that such counter-claim may be excluded.” The form of order given in Chitty’s Forms, 125, is: “I do order that the defendant’s counter-claim herein be struck out.” Power is given to the Court to “make such order as shall be just.” Acting in pursuance of this power an order was made in *Nicholson v. Jackson*, W. N. (1876) p. 38, striking out the counter-claim on the terms that the plaintiff should not issue execution without leave of the Court or a Judge.

*Some issues tried first.*—Under O. XXXVI., r. 3, one or more issues may be ordered to be tried before the other issues, but this will be granted only on very special grounds, *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918; *Piercy v. Young*, L. R. 15 Ch. D. 475.

- (5) The said Courts respectively, and every Judge thereof shall recognize and take notice of all equitable estates titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

See Imp. Act of 1873, s. 24, sub-s. 4.

See *Hughes v. The Metropolitan Railway Company*, L. R. 1 C. P. D. 120; S. Ct. n appeal, L. R. 2 App. Cas. 439, and *Williams v. Snowden*, W. N. (1880) 124, where, in an ejectment suit, it appeared that the plaintiff would have been entitled to a verdict but for an equitable right in the defendant to specific performance of an agreement made by the plaintiff for a lease of the premises. It was contended that the equitable right should have been set up as a defence or counter-claim, but it was held that under this sub-section effect must be given to the right, although not pleaded.

- (6) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either

unconditionally or on any terms or conditions, may be relied on by way of defence thereto :  
 Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit ; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice ; and the Court shall thereupon make such order as shall be just.

See Imp. Act of 1873, s. 24, sub-s. 5.

If property, belonging to a person not a party to the suit, had been sequestered or taken possession of by a Receiver, the remedy, under the earlier chancery practice, was an application to be examined *pro interesse suo*. For this, the Chancery Orders substituted a motion "for such relief as he (the owner of the property) may think himself entitled to," see G. O. Chy. 398-401.

*Frivolous and Vexatious Actions.*—Actions were brought charging the defendants with conspiring to make, and making, false statements respecting the plaintiff, an officer in the army, to the Commander-in-Chief, whereby the plaintiff was placed on half-pay. Upon application to stay the actions as frivolous and vexatious, and an abuse of the process of the Court, it was stated in the defendants' affidavits that the actions were for acts done by the defendants in the due course of their duty as members of a military court of inquiry, and this was not denied by the plaintiff :—Held that the actions ought to be stayed, on the ground that *Dawkins v. Lord Rokeby* (L. R. 7 H. L. 744) was a case directly in point, that an action under such circumstances would not lie, *Dawkins v. Prince Edward of Saxe Weimar*, *Dawkins v. Wynyard*, *Dawkins v. Stephenson*, L. R. 1 Q. B. D. 499.

See also *Edmunds v. The Attorney-General*, 47 L. J. N. S. Ch. 345.

*Application in same Division.*—A defendant in an action at law, having an equitable defence, should obtain from the Judge of the Common Law Division leave to plead that defence, and cannot obtain from a Judge of the Chancery Division a direction to stay proceedings in the Common Law Division ; and this prevails whether the action at law was commenced before or after the Judicature Acts came into operation. An action prevailing in one Division will not be stayed by another Division or Judge, unless the defence is on grounds unconnected with the cause of action, *Garbutt v. Fawcus*, L. R. 1 Ch. D. 155.

And see *Kingchurch v. The People's Garden Company*, L. R. 1 C. P. D. 45 ; *In re People's Garden Company*, L. R. 1 Ch. D. 44.

*Administration suit—Mortgagee proceeding to obtain possession.*—C. being executor of L., mortgaged certain hereditaments, which had formed part of the estate of the deceased. The plaintiff, who became mortgagee, afterwards sued to recover possession of them from her lessees on the ground of a forfeiture for non-payment of rent. C. obtained leave to defend the action as landlord. A suit had been instituted by C. in the Chancery Division to administer the estate of L., and an inquiry had been directed as to the mortgage. An order was obtained by C. staying the proceedings in the action for recovery of the hereditament until the proceedings in



the Chancery Division should have concluded:—Held that the order was bad and must be set aside, *Crowe v. Russell*, L. R. 4 C. P. D. 186.

*Interpleader action.*—Goods having been taken in execution under a *f. fa.* against W., the trustee of Mrs. W.'s settlement, claimed them as a separate estate of the wife. The sheriff thereupon took out an interpleader summons in the Common Pleas Division, upon which an order was made that upon the trustee paying £115 into Court within a limited time, the sheriff should withdraw, but in default of such payment being made, should sell, and pay the proceeds into Court, and that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into Court by the trustee within the time, and the sheriff advertised the goods for sale. Mrs. W. thereupon commenced an action in the Chancery Division to have the trust of the settlement carried into execution, a new trustee appointed, and, in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them, was granted by Malins, V. C.:—Held in appeal that this order was a restraining by injunction a proceeding pending in the Common Pleas Division, and was inconsistent with the Judicature Act, and must be discharged, *Wright v. Redgrave*, L. R. 11 Ch. D. 24.

*Proceedings pending in a foreign Court.*—Whether a Court having ample authority to decide the matter brought before it, should await the expected adjudication of another tribunal having only similar authority, is merely a question for the exercise of judicial discretion. If there be any want of power in the Court it may be well that the proceedings should be stayed in order that some other Court which has the requisite power may adjudicate. Per Lord Selborne:—"I am far from saying that there might not be cases in which a proceeding in a foreign Court might be regarded as a satisfactory way of ascertaining the legal rights of parties; and the Scotch Courts might very properly desire to ascertain the result of the foreign proceeding before determining the claim brought before themselves. But I can hardly conceive a greater miscarriage of justice than it would be, after a suit had been fought out to the end, if your Lordships were now to turn round upon a point of discretion and say the Court of Session must take into consideration what has been done in the English suit. There was no lack of material in Scotland for the necessary purposes of justice," *Phosphate Sewage Company v. Molleson*, L. R. 1 App. Ca. 780.

*Default in production.*—In an action upon a policy of marine insurance the defendant is not entitled to have the proceedings stayed until the plaintiff has obtained an affidavit of documents from a person who is not a party to the action and is not within the jurisdiction of the Court and is not under the plaintiff's control; and it is not material that the plaintiff derives his title to the subject matter of insurance through the person from whom the affidavit is sought, *Fraser & Co. v. Burrows*, L. R. 2 Q. B. D. 624.

See also *Houseman v. Houseman*, L. R. 1 Ch. D. 535; *Blewitt v. Dowling*, W. N. (1875) 202.

*Compromise of action.*—A partnership having, in an action brought by the plaintiff, been by order of the Court dissolved, the plaintiff and defendants signed an agreement of compromise, whereby it was agreed that the plaintiff should be paid a sum of money for his share in the business. The plaintiff subsequently repudiated the agreement, and proposed to proceed with his action, alleging that his signature had been obtained by fraud:—Held, on summons taken out by one of the defendants, and supported by the co-defendant that the Court had, under the Imp. Act, 1873, s. 24, s.-ss. 5, 7 (Ont. Jud. Act, sec. 16, sub-ss. 6, 8), jurisdiction to order the stay of all further proceedings in the action, *Eden v. Naish*, L. R. 7 Ch. D. 781, and see *Scully v. Lord Dundonald*, L. R. 8 Ch. D. 658; *Gilbert v. Edean*, L. R. 9 Ch. D. 259.

In *Small v. Union Permanent Building Society*, 6 P. R. 206, it was held that a compromise of a suit having been entered into before answer, the defendant may set up the compromise in his answer, and pray, by way of cross-relief that it be specifically performed; and if the plaintiff does not diligently proceed with the suit, the defendant is entitled to move to dismiss for want of prosecution. In *McAlpine v. Carling*, 8 P. R. 171, it was held that a release after action must be pleaded, and that a defendant is not entitled to an order staying proceedings.

*Prohibition—Injunction.*—The jurisdiction to grant prohibition is now conferred by the Judicature Act upon every Judge of the High Court; but, inasmuch as one

of the main objects of the Acts (Judicature Act 1873, s. 24, sub-s. 7; Ont. Judicature Act, s. 16, sub-s. 8) is to enable the Court to decide, if possible, in one proceeding, all the questions in dispute in the same matter and between the same parties; and (Imp. Act 1873, s. 25, sub-s. 8; Ont. Judicature Act, s. 17, sub-s. 8) to grant an injunction in all cases in which it shall appear to the Court "just and convenient" so to do, the Court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior Court, *Hedley v. Bates*, L. R. 13 Ch. D. 498.

A prohibition is a remedy against an encroachment of jurisdiction, issues only from a Superior Court, is granted on the suggestion that the Court to which it is directed has not the legal cognizance of the cause, and is addressed to the Judge of the inferior Court, as well as to the parties in the cause. An injunction is addressed only to the individual and not to the Court. In issuing the writ a Court of Equity not only does not deny, but in fact admits, the jurisdiction of the ordinary tribunal. The injunction merely controls the individual to whom it is addressed in the use he is attempting to make of the judgment of that tribunal as an instrument of injustice, *Eden on Injunction*, 3; *Kerr on Injunction*, 15.

- (7) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations, and liabilities existing by the Common Law or created by any Statute, in the same manner as the same would have been recognized and given effect to if this act had not passed by any of the Courts whose jurisdiction is vested in the High Court of Justice.

See Imp. Act of 1873, s. 24., sub-s. 6.

- (8) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

See Imp. Act of 1873, s. 24, sub-s. 7; See notes to sub-sec. 4.

**17.** Whereas it is expedient to amend and declare the Law

to be hereafter administered in Ontario as to the matters next hereinafter mentioned: Be it enacted as follows:

See Imp. Act of 1873, s. 25; R. S. O., c. 40, ss. 86, 87; c. 49, ss. 4, 5, 21, 23; c. 50, ss. 131-133.

- (2) No claim of a *cestui que* trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

See Imp. Act of 1873, s. 25, sub-s. 2; R. S. O., c. 108, s. 30.

This and the following sub-sections are to a large extent declaratory of equitable doctrines.

The R. S. O., c. 108, s. 30, is as follows:—When any land or rent is vested in a trustee upon any express trust, the right of the *cestui que* trust, or any person claiming through him to bring a suit against the trustee, or any person claiming through him to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and by any person claiming through him.

The present Statute does not appear to be limited to land as is the Rev. Stat.

The present clause does not exactly express the law as formerly administered by the Court of Equity. The former law may be shortly stated as follows: "a trust to be within the saving of this principle must be, in the first place, direct or express, and secondly, of a nature not cognisable at law, but solely in equity. There is, too, a third qualification of the doctrine, viz., that it applies (at all events in its universality) only between the trustee and his *cestui que* trust," Banning on Limitations, 187; see also *Tiffany v. Thompson*, 9 Gr. 244; *Gunn v. Adams*, 8 C. L. J. N. S. 211; *Townsend v. Townsend*, 1 Bro. C. C. 554.

- (3) An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

See Imp. Act of 1873, s. 25, sub-s. 3.

Equitable waste may be defined to be such acts as at law would not be esteemed waste under the circumstances of the case, but which, in the view of a Court of Equity, are so esteemed, from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them, *Taylor's Eq. Jur.* s. 677. See *Micklewait v. Micklewait*, 1 D. & J. 504, 524.

Thus if a tenant for life, without impeachment of waste, should pull down houses or cut down trees planted for ornament or shelter, *Vane v. Lord Barnard*, 2 Vern. 738; *Packington's case*, 3 Atk. 215; *Bubb v. Yelverton*, L. R. 10 Eq. 465; *Honywood v. Honywood*, L. R. 18 Eq. 306.

The presence or absence of a bad motive is immaterial, *Turner v. Wright*, 2 D. F. & J. 234. An account may be had of past waste, *Higginbotham v. Hawkins*, L. R. 7 Ch. App. 676.

The Court considers the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust, and therefore controls it; but it exercises that control with reference to the presumed will and intention of the party by whom the power was created, and not to any fancied notions of its own, Per Sir George Turner, in *Marker v. Marker*, 9 Ha. 17; see also *Packington's case*, 3 Atk. 215; *Com. Dig. Chy. D. 11*.

- (4) There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

See Imp. Act of 1873, s. 25, sub-s. 4.

The R. S. O., c. 99, sec. 1, is as follows:—Any mortgagee of freehold or leasehold property, or any assignee of such mortgagee, may take and receive from the mortgagor or his assignee a release of the equity of redemption in such property, or may purchase the same under any judgment or decree or execution, without thereby merging the mortgage debt as against any subsequent mortgagee or person having a charge on the same property.

Merger is where a greater estate and a less coincide, and meet in one and the same person in the same right, without any intermediate estate, in which case the less is immediately annihilated, or, in the law phrase, is said to be merged in the greater, or if the fee comes to tenant for years or life, the particular estate is merged in the fee, *Wiscot's case*, 2 Rep. 60, 61; *Smith's Real and Personal Property* (3rd Ed.), 1150.

The rule of extinguishment differs only from that of merger in being applicable to a charge or right, instead of a preceding estate.

Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united, see *Sir W. Grant in Forbes v. Moffatt*, 18 Ves. 390; *Anderson v. Pignet*, L. R. 8 Chan. 188; and see *Lord Compton v. Oxenden*, 2 Ves. 264; *Heney v. Low*, 9 Gr. 265.

A question may arise under this sub-sec. whether the word "estate" includes a charge. The equitable doctrine is more frequently applied in determining whether a charge merges in an estate than in cases where two estates meet.

*Sir John B. Robinson, C. J.*, in *Street v. The Commercial Bank* (1 Gr. 169) referring to *Forbes v. Moffatt* (18 Ves. 384) thus refers to the law of merger, as it existed prior to the above statute:—"The principle settled by this judgment is, that where one having a charge acquires the legal estate, his charge sinks or not, according as it appears to be for his interest or otherwise that it should subsist. If he manifests an intention that it should sink it does sink, if not, and he is indifferent, then it also sinks; if no intention is shewn, and it may be in his favour to prevent a prior mortgagee from coming in, it will not be treated as being sunk." This language was adopted by *Draper, C. J.*, in *Hart v. McQuesten* (22 Gr. at p. 137). *Burton, J.*, held that the Statute was not merely declaratory of the existing law. He said:—"As remarked by *Mowat, V. C.*, in *Finlayson v. Mills* (11 Gr. 218) the object of the Legislature was to prevent a merger of the debt by the operation of any technical rule where such a result would contravene the intention of the parties. It is still in the power of parties to make any arrangement they may think proper, but I apprehend that the effect of the Statute is to shift the onus of proof, and to throw upon a subsequent incumbrancer, desirous of availing himself of a merger, the necessity of proving it," at pages 143, 4.; see also *Elliott v. Jayne*, 11 Gr. 412; *Barker v. Eccles*, 17 Gr. 631.

The latest case upon the subject is *The North of Scotland Mortgage Company v. German* (31 U. C. C. P. 349). In that case, in response to a notice from the plaintiffs the mortgagees, of an instalment being due on the defendant's mortgage, the defendant's solicitor wrote that as defendant was unable to pay the claim, or redeem, and to save plaintiffs' costs, he would give them a conveyance of his equity of redemption. The plaintiffs thereupon conferred with H., their local agent and valuator, who advised them to take a deed, which they agreed to do, but only to enable them to sell the property, and defendant was to have any surplus over the mortgage debt, but that they would not release him from his covenant. An ordinary deed in fee simple was thereupon sent to defendant, and executed by him and his wife, H. at the same time informing him that he was to have such surplus; and also then informed him, as well as after the transaction had been closed wrote to him, that the plaintiffs would send a discharge, though without any authority from the plaintiffs to do so, and defendant stated that he signed on this understanding:—Held (*Galt, J.* dissenting) that there was no

merger of the mortgage debt, but the defendant still remained liable therefor, the equity of redemption having been released only to enable the plaintiffs more conveniently to sell. Per Wilson, C. J.: The accountability for the surplus of the proceeds of the sale, shewed the true nature of the transaction. Per Osler, J.: The merger of the mortgage was a question of intention, such intention being a matter of fact. Per Galt, J.: When the plaintiffs accepted from defendant a release of his equity of redemption without any reference to or mention of the mortgage debt, they thereby, as to interest upon one security, discharged the defendant, and the charge became merged, being reduced to the rate recoverable upon a collateral security, see *St. John v. Rykert*, 4 App. R. 213.

Estates tail are not subject to merger; so that a man may have at the same time, and in his own right both an estate tail, and the immediate reversion in fee in the same land; because the object of the Statute De Donis being to render estates inalienable, if they were allowed to merge in the fee simple, tenants in tail might have destroyed them by purchasing the fee simple, *Smith's Real and Personal Property*, 1160.

- (5) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or sue or distrain for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person, and in that case he may sue or distrain jointly with such other person.

See Imp. Act of 1873, s. 25, sub-s. 5.

By this sub-section the mortgagor is treated as the owner of the land, and the mortgagee as having merely a charge thereon, until he has given notice to take possession, see before this Act, *Trent v. Hunt*, 17 Jur. 899; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, and notes to *Keech v. Hall*, 1 Sm. L. C. (6th Ed.) p. 523.

If loss arises to the mortgagor, where the mortgagee gives notice to tenants and refuses to proceed, the loss will fall on the mortgagee, *Heales v. McMurray*, 23 Beav. 401.

As to circumstances under which the mortgagor will be entitled to possession of the mortgaged property, notwithstanding the absence of a redemption clause, see *Superior Savings and Loan Society v. Lucas*, 44 U. C. R. 106.

- (6) In case of an assignment of a debt or other chose in action, if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of law for the relief of trustees,

See Imp. Act of 1873, s. 25, sub-s. 6.

See R. S. O., c. 116, ss. 6, 12, as to assignment of choses in action.

It is no objection to an assignment, in equity, of a claim against a third person, that the work upon which the claim is to arise has yet to be performed. A printer, being about to execute a contract of printing for a customer, applied to a paper maker for a supply of paper, but which he refused to supply unless secured therefor; thereupon a memorandum was signed, with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the date of completing the work:—Held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the scope of the general authority of the managers of the business. The customer, after having been notified of this arrangement, paid the amount to the printer:—Held, that such payment was made in his own wrong; and he was ordered to pay the amount to the plaintiff, the assignee, *Buntin v. Georgan*, 19 Gr. 167. A debt or other chose in action may be assigned in equity, without any concurrence on the part of the debtor. A railway contractor gave his bankers a letter directing the railway company to pass the cheques, which might become due to him, "to his account with the bank":—Held, that this was not an equitable assignment, but that it would have been if it had directed the cheques to be passed to the bank. *Bell v. The London and North-Western Railway Company*, 15 Beav. 548; see also *Reifenstein v. Hooper*, 36 U. C. R. 295; *Cole v. Bank of Montreal*, 39 U. C. R. 54; *Dawson v. Graham*, 41 U. C. R. 532; *Wood v. McAlpine*, 1 App. R. 234; *Howell v. McFarland*, 2 App. R. 31; *Mitchell v. Goodall*, 44 U. C. R. 398; 5 App. R. 164; *Re Haisley*, 44 U. C. R. 345; *Patterson v. Kingsley*, 25 Gr. 425; *McKenzie v. Montreal and City of Ottawa Junction Railway Company*, 27 U. C. C. P. 224; 29 U. C. C. P. 333; *Lamb v. Sutherland*, *Lamb v. Allen*, 37 U. C. R. 143; *Caldwell v. The Merchant's Bank*, 26 U. C. C. P. 294; *Coates v. Lloyd*, 3 U. C. R. 51; *Claxton v. Gilbert*, 24 U. C. C. P. 500; *Wilcox v. Pillow*, 28 U. C. C. P. 100; *Greet v. Citizen's Insurance Company*, 27 Gr. 121; *Ferguson v. Elliott*, 12 L. J. N. S. 249; *Bain v. McCarty*, 13 L. J. N. S. 298; *O'Connor v. McNamee*, 28 U. C. C. P. 141; *The Postmaster General v. Robertson*, 41 U. C. R. 375; *Harris v. Meyers*, 2 Ch. Ch. R. 121; *Cogswell v. Sugden*, 24 Gr. 474.

For the Trustee Acts see *post*.

- (7) Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

See Imp. Act of 1873, s. 25, sub-s. 7.

To render, in equity, time of the essence of a contract it must be clearly and expressly stipulated that it shall be so; it is not enough that a time is mentioned during which or before which something shall be done, *Hearne v. Tenant*, 13 Ves. 287; but where time is not originally of the essence of the contract, if either party delays, the other may, by reasonable notice, make it so, *Walter v. Jeffries*, 1 Ha. 348; *Nott v. Riccard*, 22 Beav. 307. A Court of Equity will relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances which would make it equitable to interfere with, and modify, the legal right. That is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract, *Roberts v. Berry*, 3 D. M. & G. 284; and see *Tilley v. Thomas*, L. R. 3 Chan. App. 66; *Wells v. Maxwell*, 32 Beav. 550; on App. 9 Jur. N. S. 1021; *Hipwell v. Knight*, 1 Y. & C. 415.

- (8) A mandamus or an injunction may be granted or a



receiver appointed by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

See Imp. Act of 1873, s. 25, sub-s. 8; R. S. O., c. 40, s. 39; c. 52.

*Mandamus.*—Under R. S. O. c. 52, s. 4 *et seq.*, will be found the practice heretofore existing as to mandamus in actions other than replevin and ejectment. Sec. 8 provides that the writ of mandamus, so issued as aforesaid, shall have the same force and effect as a peremptory writ of mandamus, and in case of disobedience, may be enforced by attachment. Sec. 10 provides as follows:—“Nothing in the preceding provisions of this Act contained shall take away the jurisdiction of either of the Superior Courts of Law to grant writs of mandamus; nor shall any writ of mandamus, issued out of such Court, be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this Act, but the preceding provisions of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by either of the said Superior Courts of Law. The subsequent sections prescribe the practice where the writ is obtainable upon motion. The whole subject was much discussed in *In Re The Stratford and Huron Railway Company and The Corporation of the County of Perth*, 38 U. C. R. 112. In that case Burton, J. said (p. 143):—“The inclination of the Courts of late years has been to enlarge the remedy by mandamus, and the objection, which at one time existed, to granting it, if the applicant had any other remedy, is to a very great extent removed by the facility now afforded for the examination of the parties and their witnesses before the Court or the Judge applied to, and from the fact that a mode now exists of revising the proceeding by appeal, both by this Court and the Supreme Court. It is laid down in Mr. High's valuable work, that the object of a mandamus being to enforce specific relief, it follows that it is the inadequacy rather than the absence of other legal remedies, coupled with the danger of a failure of justice, without the aid of a mandamus, which must usually determine the propriety of this species of relief. . . . The existence of possible equitable remedies does not affect the jurisdiction of Courts of Law in attaining the same end by writ of mandamus, and the Act of 1873 was intended to do away with the old system of driving a suitor from one Court to seek redress in another, where, perhaps, he might again be met with the objection, that he should seek his remedy in the Court which had already declined to hear him. The language of that Act is, that the Courts of law and equity shall be, as far as possible, auxiliary to one another respectively, for the more speedy, convenient, and inexpensive administration of justice in every case. I think, therefore, that, as the applicants have selected a Common Law Court as the forum to adjudicate upon the questions in dispute, they should be entitled to succeed, if they have disclosed a case which would entitle them to relief in a Court of Equity;” and Moss, J. said (p. 155):—“It is commonly said that the granting or withholding of this high prerogative writ is a matter for the discretion of the Court. But I apprehend that this discretion—at least in cases resembling that now under review—should be exercised according to some fixed and general rules. There is no sound reason for

leaving discretion in such cases to be exercised on arbitrary principles, or according to the ideas of natural justice of the particular Judge or Court. There is no just cause why, upon an application for a mandamus, the door should be opened to the inconveniences which attend *jus vagum et incertum*. I should not think it cause of wonder, that the most patriotic of suitors failed to recognize the perfection of reason in the law of his country, if he was refused a manifestly efficacious remedy upon the ground that the Court was not satisfied that he could not obtain redress by the ordinary forms of legal procedure. The idea that a peculiarly wide field for the exercise of judicial discretion was opened upon an application for the writ of mandamus was no doubt founded upon its original prerogative character. While it was deemed an emanation from the sovereign as the fountain of justice, who was in legal fiction still personally presiding *in curia*, this theory was natural and intelligible. The Court was expressing the will of the sovereign and exercising one of his attributes, rather than administering the general law, to which every subject was entitled to appeal as of right. But, in my opinion, the writ is not invested with any prerogative character in this Province. It is not attached to any particular Court, but may issue out of either of the Superior Courts of Common Law. It is true that in the preamble to the Act, (35 Vic., c. 14, O.) the writ is termed 'the prerogative writ of mandamus,' and the avowed object of the enactment is to prevent the injustice done in many cases by the delay in its issue, and to devise a more speedy and summary method for the issue of the same; but it would be giving extraordinary force to the use of this appellation for the writ in the preamble to make it countervail the considerations to which I have alluded. It was an accustomed and familiar description of the writ, which the author of the statute naturally enough employed, and the Legislature adopted, without any possible intention that its use should influence the question as to what principles should govern judicial action with respect to the writ. My own opinion is, that it would be found a safe and convenient rule for a Judge to act upon principles similar to those which govern a Court of Equity in a suit for specific performance. That Court refused to interfere where there was an adequate legal remedy, and while it treated the jurisdiction as discretionary, the exercise of that discretion was limited and controlled by defined and well settled rules. The authorities establish that where there is a clear, adequate, and appropriate legal remedy giving the aggrieved party perfect redress, the writ should not issue, so that this far the analogy is complete between applications for the writ under suits for specific performance, or specific delivery. Lord Mansfield states that the writ was introduced to prevent disorder from failure of justice, and that it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one (*Rex v. Barker*, 3 Burr. 1265). No doubt, as the language of Lord Mansfield suggests, the class of cases in which it was originally resorted to was narrow, but the want of a specific remedy at common law is the special feature which led to its introduction, and contributed to that development of its scope which may be plainly traced in its history. Blackstone (3rd Ed., Vol. 3, p. 116) says:—'It issues in all cases where the party has a right to have anything done, and has no other specific means of compelling its performance.' It is interesting to read in this connection the observations of Lord Redesdale in *Harnett v. Yielding* (2 Sch. & L. 549, 552) and compare their resemblance. That great master of the history and practice of the Court of Chancery says that unquestionably the original foundation of the jurisdiction exercised in decreeing specific performances was simply this, that damages at law would not give the party the compensation to which he was entitled, that is would not put him in a situation as beneficial to him as if the agreement were specifically performed.

"Originated, as these two branches of jurisdiction were, to supply similar defects in the ordinary administration of the jurisprudence of the country, it would seem fitting to pay regard to the rules of equity—at least in cases where there is a convenient remedy in equity. Especially must this be appropriate since the decision can be reviewed. Take the present application as an illustration. It will not be doubted that a suit in equity might have been instituted to compel the delivery of these debentures. From a decree of the Court of Chancery an appeal might have been brought to this Court and ultimately to the Supreme Court. It surely would be opposed to the whole spirit of recent legislative efforts to give a party the complete redress to which he may be entitled, without driving him into another Court, if it could be contended with success that the decision in appeal should depend upon the forum in which proceedings were initiated. There is no reason to suppose that the materials before this Court would be at all different if the appeal were from a decree."



In *Re Hamilton and North Western Railway Company v. The Corporation of the County of Halton*, 39 U. C. R. 93, Harrison, C. J. said (p. 108):—"The well known rule is never to interfere by writ of mandamus, unless the party making the application has no other specific legal remedy. (Rex v. Barker, 3 Burr. 1265; Rex v. Windham, Cowp. 377; Rex v. Bishop of Chester, 1 T. R. 396; Rex v. Bristol Dock Company, 12 East 429; Rex v. St. Catharines Dock Company, 4 B. & Ad. 360, 363.) It is argued by Mr. Osler that this means a specific legal remedy at law, and that a specific remedy in equity is no ground for refusing a writ of mandamus. The contention is opposed to the view expressed by Mr. Justice Gwynne in the Wawanosh case (36 U. C. R. 93), where he said (p. 100):—"The rights of the railway company to have debentures, whatever these rights may be, . . . appear to me to depend upon matters of contract, and the points urged before me in opposition to the rights of the railway company, appear to me to be of such a nature that I should not determine them upon an application for a mandamus, which writ should not be issued for the purpose of adjudicating thereunder upon rights arising out of contract, where the parties have an ample remedy, and much more suitable to be pursued by bill in equity." It is to be observed that the contract in the Wawanosh case, as here, was only signed by the railway company, and not by the municipality. The decisions in the United States are in favour of Mr. Osler's contention. It was held by the Supreme Court of Michigan, in *The People v. State Treasurer*, 24 Mich. 468, that the existence of possible equitable remedies does not affect the jurisdiction of Courts of law by writ of mandamus, for they (such remedies) may be regarded in determining the exercise of discretion in allowing the writ, but they cannot affect the jurisdiction." (Per Campbell, J., *ib.*, 478.) Mr. Justice Nelson, of the Supreme Court of New York, in an earlier case, *The People v. Mayor of New York*, 10 Wend. 395, 396, said:—"It is contended that a mandamus is not the appropriate remedy in this case. The proposition is, I believe, universally true that the writ of mandamus will not lie in any case where another legal remedy exists, and it is used only to prevent a failure of justice. By legal remedy is meant a remedy at law, and though the party might seek redress in Chancery, that of itself is not conclusive objection to the application; that may and should influence the Court in the exercise of the discretion which they possess in granting the writ under the facts and circumstances of the particular case, but does not affect its right or jurisdiction." In *Commonwealth v. the Commissioners of Alleghany County*, 32 Penn. St. 218, 223, Mr. Justice Woodward, of the Supreme Court of Pennsylvania, said:—"I need not consider whether he (the appellant) had any remedy in equity, for according to the best authorities, both English and American, the existence of an equitable remedy is not a ground for refusing mandamus." (See further *Hardcastle v. Maryland and Delaware Railway Company*, 32 Md. 32; *People v. City of Chicago*, 53 Ill. 424.) The broad ground on which the writ is granted or refused is stated in *Rex v. Windham*, Cowp. 377, 378, by Lord Mansfield in referring to the argument of Mr. Kenyon, where Lord Mansfield said:—"Mr. Kenyon has said very truly, that where there is no other specific legal remedy to attain the ends of justice, the course must be by mandamus, which is a prerogative writ, and the very form of it shews its object to be to prevent a defect of justice." (See further *Rex v. The Severn and Wye Railway Company*, 2 B. & Ald. 646; *Marbury v. Madison*, 1 Cranch, 49, 137; *Kindull v. The United States*, 12 Peters 524, 613; *Decatur v. The Secretary of the Navy*, 13 Peters 512; *Brashear v. The Secretary of the Navy*, 6 How. 92; *United States v. Seaman*, 17 How. 225, 228.) In *Regina v. Garland et al.*, L. R. 5 Q. B. 269, 272, Cockburn, C. J., said:—"I rest the refusal of the writ entirely on the special circumstances of the case, and on the ground that in the exercise of that discretion which we have to grant or refuse the extraordinary process of the Court, we ought to refuse it in the present case." (See further *Nicholl v. Allen*, 1 B. & S. 916, 934; *Regina v. The Parish of St. Nicholas-without*, 10 Jr. L. R. 113.) The prerogative writ should not issue merely because the party applying for it would be otherwise remediless. The granting or refusing of the writ, and whether the writ shall be absolute or only *nisi*, must in each particular case rest in the sound discretion of the Court. (*People v. Dawling*, 55 Barb. N.Y. 197; *ex parte Garland*, 42 Ala. 559.) In a case involving numerous questions of law and fact, and where acts of parties connected with it may be valid or void, depending on circumstances which rest on parole proof, it is not usual to grant the writ, *United States v. Commissioner*, 5 Wall. 563. The conclusion which I draw from the authorities is the same as that of Mr. High in his work on Extraordinary Legal Remedies, Ch. 1, viz.: that it is the inadequacy and not the mere absence of all other legal remedies, coupled with the

danger of a failure of justice without it, that must usually determine the propriety of the exercise of a discretion in granting or refusing the prerogative writ of mandamus. And I agree with Mr. Justice Gwynne in the *Wawanosh* case in thinking that the remedy by the prerogative writ of mandamus is not an appropriate remedy for the enforcement of rights arising out of contract. See further *Benson v. Paull*, 6 E. & B. 273; *Norris v. The Irish Land Company*, 8 E. & B. 512; *Bush, et al., v. Beaven*, 1 H. & C. 500; *The State v. Zanerville Turnpike Company*, 16 Ohio St. 308. While I am satisfied of the power of the Court to issue a writ of mandamus in the case now before us, I am not satisfied that the case under all the circumstances is one proper for the present exercise of judicial discretion in favour of granting the writ.

As to the effect of this new provision, Mr. Arthur Wilson (p. 29) states his view as follows:—"A mandamus may be granted in all cases in which it shall appear to the Court to be just or convenient that such order should be made. It may be said, on the one hand, that these words cannot be intended merely to give to all divisions such powers for the specific enforcement of rights as have hitherto been exercised by any of the Courts, for this has been already fully provided for by s. 16 (Ont. Judicature Act, s. 9), and s. 24, sub-a. 7 (Ont. Judicature Act, s. 16, sub-a. 8). And, moreover, the present section purports to deal not merely with procedure but with rules of law. On the other hand, it can hardly be supposed that the Legislature intended by these few words to give power to enforce specifically all rights and duties whatever without regard to the doctrines previously well settled. Probably the true view is, that mandamus is to be understood strictly in the sense in which it has been used in the Common Law Courts; that the subject matters, the classes of rights, to which it is applicable, are unchanged; and that the effect of the new provision is first, to give to the Court a very wide discretion as to the issue of the writ; and, secondly, to allow it to be issued upon an interlocutory application instead of its necessarily being claimed upon the writ and by pleadings, without, in fact, an action of mandamus being brought within the meaning of the C. L. P. Act. See, however, as to indorsing the claim on the writ, *Colebourne v. Colebourne*, L. R. 1 Ch. D. 690."

*Injunctions.*—The power of the Common Law Courts as to injunctions was based upon R. S. O., c. 52, s. 30. It was as follows:—"The plaintiff may at any time after the commencement of any action, and whether before or after judgment, apply *ex parte* or otherwise, to the Court or a Judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of any breach of contract or wrongful act complained of in the action, or from the commission of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; and such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge seems reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the Court, or, when such Court is not sitting, by a Judge."

It would be impossible in this place to give any adequate account of the exercise by the Court of Chancery of its jurisdiction with respect to injunctions. It may suffice to point out that the difficulty as to granting injunctions in cases of trespass where the plaintiff was not in possession (as to which see *Stanford v. Hurlstone*, L. R. 9 Ch. App. 116) seems to be entirely removed by the present Act.

The principle upon which the Court of Chancery acted in cases of interlocutory injunctions is laid down in *Cory v. The Yarmouth and Norwich Railway Company*, 3 Hare, 593:—"If the Court is clearly against the plaintiff it may refuse the injunction. . . . But, on the other hand, if the Court is clearly with him, the Court may, in the exercise of its discretion grant the injunction in the first instance. Supposing the question of the legal right to be one on which the Court is not prepared to express an opinion, the Court is generally governed by the consideration of the convenience or inconvenience on the one side or on the other. If giving to one party the power of doing the acts complained of would be attended with irreparable or very serious mischief to the other, the injunction is more commonly granted; but if, on the other hand, there be a balance of inconvenience, the Court will generally leave the parties in the situation in which they are until the legal right shall have been established. This exposition of the law was approved of in *McLaren v. Caldwell*, 5 App. Rep. 358.

An injunction, to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the Court shall think

just," under the Judicature Act, 1873, s. 25, sub-s. 8, (Ont. Judicature Act, s. 17, sub-s. 8). The terms and conditions which the Court thought just and imposed on tenants, who sought to restrain their landlord from distraining on certain rent until the determination of an action brought by them against him, to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into Court, *Shaw v. Earl of Jersey*, L. R. 4 C. P. D. 359. The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every Judge of the High Court, but, inasmuch as one of the main objects of the Acts (Judicature Act, 1873, s. 24, sub-s. 7; Ont. Judicature Act, s. 16, sub-s. 8) is to enable the Court to decide, if possible in one proceeding, all the questions in dispute in the same matter and between the same parties, and (Judicature Act, 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the Court "just and convenient" so to do, the Court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior Court, *Hedley v. Bates*, L. R. 13 Ch. D. 498. This section of the Act has not altered the principles on which the Court acts in granting injunctions, *Gaskin v. Ball*, L. R. 13 Ch. D. 324. The extensive jurisdiction of granting injunctions originally given to the Common Law Courts by the Common Law Procedure Act, is now vested, by virtue of the Judicature Act, in the High Court of Justice. All acts, therefore, which a Common Law Court, or a Court of Equity only, could formerly restrain by injunction, can now be restrained by the High Court. The jurisdiction of granting injunctions is thus vested in the High Court in any case in which it is right or just to do so, having regard to settled legal reasons or principles. The Court will restrain an arbitrator by injunction from acting in any case in which he is, in the opinion of the Court, unfit or incompetent to act, *Beddow v. Beddow*, L. R. 9 Ch. D. 89, and see also *Thorley's Cattle Food Company v. Massaw*, L. R. 6 Ch. D. 582. In *Cooper v. Whittingham*, 43 L. T. N. S. p. 16, *Jessel, M. R.*, in referring to the above sub-section, said: "This section may be said to be a general supplement to all Acts of Parliament." But see *Thomas v. Williams*, 43 L. T. N. S. 91; L. R. 14 Ch. D. 864. The plaintiff, an alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any composition proceedings taken under the Debtors' Act, 1869. He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the corporation of the borough having been summoned by notice for the purpose of declaring the office held by the plaintiff void under the Municipal Corporation Act 1835 (5 & 6 Will. 4 c. 76), s. 52, and the Debtors' Act, 1869, s. 21, and electing a successor:—An injunction was granted, at the instance of the plaintiff, restraining the corporation from proceeding under their notice, on the ground: (1) That, having regard to the express words of the above sections, the plaintiff had not become disqualified from holding office; (2) That under section 25, sub-s. 8, of the Judicature Act, 1873, the Court had no jurisdiction to grant the injunction; and (3) That, having regard to section 34 of the same Act, the action, which claimed the injunction only, had been properly brought in the Chancery Division, *Aslatt v. Corporation of Southampton*, L. R. 16 Ch. D. 143; and see *Mearns v. Petrolia*, 28 Gr. 98.

*Injunctions—Costs.*—Where the action could be determined upon an interlocutory motion for injunction it is the plaintiff's duty to make such application, and if he goes down to examination of witnesses and hearing he may be refused the additional costs, *Baker v. Wood*, W. N. (1881) 7.

*Receivers.*—The Common Law Courts now, for the first time, obtain the power of appointing receivers. The jurisdiction in Chancery is of frequent exercise, particularly in suits against *executors and trustees*, *Richards v. Parkins*, 3 Y. & C. 299; *Brodie v. Barry*, 3 Mer. 695; *Wilson v. Wilson*, 2 Keen, 249; *Pritchard v. Fleetwood*, 1 Mer. 54; *Middleton v. Dodswell*, 13 Ves. 266; *Lord v. Purchase*, 17 Beav. 171; in *re H's estate*, L. R. 1 Ch. D. 276; *Vernon v. Kinsie*, 2 O. C. R. O. S., 40; *Sanders v. Christie*, 1 Gr. 137; *Meacham v. Draper*, 2 Gr. 316; *Harrold v. Wallis*, 9 Gr. 443; in *partnership cases* *Const v. Harris*, T. & R. 496, 517; *Goodman v. Whitcomb*, 1 J. & W. 589; *Fairburn v. Pearson*, 2 Mac. & G. 144; *Clegg v. Foshwick*, 1 Mac. & G. 294; *Sargant v. Read*, L. R. 1 Ch. D. 600; *Prentiss v. Brennan*, 1 Gr. 371; *Bilton v. Blakely*, 6 Gr. 575; S. C. 7 Gr. 214; *Doupe v. Stewart*, 13 Gr. 637; *Steele v. Grossmith*, 19 Gr. 141; *railway cases*, *Russell v. The Great Anglican Railway Company*, 3 Mac. and G. 125; *Furness v. The Caledonian Railway Company*, 32 L. J. Ch. 170; *re Manchester and Milford Railway Company*, L. R. 14 Ch. D. 645; *Peto v. Welland Railway*, 9 Gr. 455; *Simpson v. The Ottawa and Prescott Railway Company*, 1 Ch. Ch. R. 99, 126.)

For the practice in Chancery on the appointment of a receiver, see G. O. Chy., 278 to 283. For discussion as to the powers of appointing receivers given to the Court by this Act, see *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. D. 275. For cases in which a receiver will be appointed, see *Berney v. Sewell*, 1 J. & W. 648; *Owen v. Homan*, 3 Mac. & G. 378; *Silver v. Bishop of Norwich*, 3 Swanst. 112; *Smith v. Smith*, 10 Ha. App. 71.

Under O. XLVI. r. 4:—An application for an order under section 17, sub-section 8, of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said sub-section 8, it may be made either *ex parte* or on notice, and if for an order under the said Rules 2 or 3 of this Order, it may be made, after notice to the defendant, at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance, by the party making the application. And by r. 6 of the same order:—No writ of injunction shall be issued in any case. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction now has. O. XLVII. r. 1 provides as follows:—Where by these Rules any application is authorized to be made to the Court or a Judge in an action, such application shall be made by motion. And see the following rules of the same order as to the practice upon motions.

*Practice*—Plaintiff should endorse his writ with a claim for an injunction or receiver, when the obtaining of either is a substantial object of the action, *Colebourne v. Colebourne*, L. R. 1 Ch. D. 690.

Under the power given by the Judicature Act, 1873, s. 25, sub-s. 8 (Ont. Judic. Act, sec. 17, sub-s. 8), to appoint a receiver in all cases in which it shall appear just and convenient, the order made on interlocutory application for the appointment of a receiver was extended to the whole property comprised in the plaintiff's security, as to part of which he was legal and as to part equitable mortgagee, *Pease v. Fletcher*, L. R. 1 Ch. D. 273. In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an *ex parte* motion before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to Chambers for that purpose, which the Vice-Chancellor had directed. The plaintiff undertook to deal with the property only under the direction of the Court, and to abide by any order which the Court might make as to damages or otherwise, *Taylor v. Eckersley*, L. R. 2 Ch. D. 302. On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary, *Boyle v. Bett's Llantwit Company*, L. R. 2 Ch. D. 726. In an action by debenture holders of a mining company against the company for foreclosure, the Court has jurisdiction to make an interim order for the appointment of a manager, *Peek v. Trinsmaran Iron Company*, L. R. 2 Ch. D. 115.

A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an *elegit* against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charge enforced by sale, foreclosure, delivery in execution, or otherwise as the Court might direct, and asking for a receiver. The plaintiff then moved for a receiver in the new action:—Held that plaintiff might obtain a receiver on interlocutory application in the action, *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. D. 275. In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed, the Court of Appeal (no previous application having been made to the Divisional Court or a Judge) appointed the plaintiff receiver and manager of the farm, without security, on his undertaking to abide by any order which the Court might make in the matter, *Hyde v. Warden*, L. R. 1 Ex. D. 309. A, who was a member of a firm of solicitors, was appointed executor of a will, probate of which was contested. Immediately after the testator's death, A. commenced against his widow an action in the Chancery Division to administer his estate, the writ in which was by leave of the Court amended by asking for a receiver pending the litigation in the Probate Division. A's firm appeared for both the plaintiff and defendant in the Chancery action, and an order was made appointing A. to be receiver of the personal estate until the decision of

the Probate action, and also to receive the rents of the real estate, the only security ordered being the payment of £2,000 into Court, though the rents were about £3,500 per annum. The widow after obtained an order to change her solicitors, and moved to discharge A. from being receiver. She denied having given the firm any authority to appear for her, and it was established, at all events beyond doubt, that she had never sanctioned the appointment of A. as receiver:—Held by the Court of Appeal, that the appointment of A. as receiver was improper, for that the appointment of a member of the firm of the plaintiff's solicitors to be receiver makes it impossible to secure the proper checking of the receiver's accounts, and that a party to the action ought not, except in an extreme case, to be appointed without the assent of the other party. A. was accordingly discharged from being receiver and ordered to pay the costs, both in the Appeal Court and in the Court below, *In re Lloyd, Allen v. Lloyd*, L. R. 12 Ch. D. 447. The plaintiff, in an ejectment action, which was set down for trial, but had been stayed until another action affecting the same property, and brought by the defendant in ejectment against the plaintiff and others should be ready for trial, moved for a receiver and for attornment to him. The defendant in ejectment set up a defence that in equity the plaintiff was only a sub-mortgagee. The evidence in support of the motion shewed that the property was wasting, and that, even if the plaintiff was only sub-mortgagee, it was insufficient for the original mortgage upon it; and this evidence was not met to the satisfaction of the Court:—Held, that under the circumstances it was just and convenient within the Judicature Act, 1873, s. 25, sub-section 8 (Ont. Judic. Act, s. 17, sub-s. 8), now to appoint a receiver, and an order was made accordingly, unless the defendant elected within four days to pay an occupation rent into Court, the amount to be settled in Chambers, *The Real and Personal Advance Company v. McCarthy*, 27 W. R. 706.

One appointed "on giving security" is not receiver until it is given, *Edwards v. Edwards*, L. R. 2 Ch. D. 291. This would seem to over-rule, *Fairfield v. Weston*, 2 S. & S. 96; and see *Western Canada v. Ince*, 8 P. R. 262.

For example of terms and conditions upon appointment of receiver, see *Shaw v. Earl of Jersey*, L. R. 4 C. P. D. 359.

As to appointing a receiver, instead of issuing a sequestration, see *Bryant v. Bull*, L. R. 10 Ch. Div. 153.

### (9) In questions relating to the custody and education of infants, the Rules of Equity shall prevail.

*Authority of father at Common Law.*—In *The King v. Greenhill*, 6 N. & M. 244, in a very strong case in favour of the mother, it was after grave deliberation, held that the father is, by the Common Law, entitled to the custody of his legitimate children even to the exclusion of the mother, although they be within the age of nurture; and it is the bounden duty of a Court of Common Law to take them from the mother and to place them in the custody of the father, unless there be well-founded apprehensions of the father acting with extreme harshness, or cruelty, or with gross profligacy, or immoral conduct, so that the child would be in danger of contamination, in which case the Court might withhold interfering to grant an order for taking them out of the mother's custody. In *re Hakewell*, 12 C. B. 223, decided in 1852, it is said that where the father was in possession of his legitimate children, a Court of Common Law had, under no circumstances, any power to control or interfere with that right. But the Court of Chancery, under certain circumstances as exercising the controlling power of the Crown as *parens patrie*, did and does exercise the power of removing children from the custody and care of the father.

*The Statute 12 Car. 2, c. 24, sec. 8*, enacts that "where any person [hath or shall leave any child or children under the age of twenty-one years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children . . . by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall respectively thinke fit to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remaine under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants, and that such disposition of the custodie of such child or children . . .



shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardians in socage or otherwise, and that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children, and shall and may recover damages for the same in the said action for the use and benefit of such child or children."

*Conflict between Law and Equity.*—The Courts of Law held that this Act left no room for the exercise of any discretion in a contest between a guardian appointed by the will of the father and other persons who might have the custody of the children. The Court of Chancery, however, notwithstanding the Act, was accustomed to interfere with the exercise of the legal right and to restrain in cases where it appeared necessary in the interests of the infants to do so. The cases of *re Andrews*, L. R. 8 Q. B. 153, and *Andrews v. Salt*, L. R. 8 Ch. App. 622, are good illustrations of this conflict, and some extracts from the judgments will be instructive. Both cases were as to the custody of the same female infant. By an ante-nuptial settlement, it had been agreed that any sons of the marriage should be educated as Roman Catholics and any daughters as Protestants. The father, by his last will, directed that all his children should be brought up as Roman Catholics, and appointed his brother their guardian. At this time the child was about nine months old. The mother retained the custody of the child until she was nearly nine years of age, educating her as a Protestant, and at that period the guardian applied to the Court of Queen's Bench for a writ of *habeas corpus*. That Court held that the guardian was legally entitled to the custody of the child, and that a court of law had no discretion to refuse it to him, he being a fit person and the child too young to choose for itself. In giving judgment Archibald, J., said:—"Then the question which arises is, whether as a Court of Common Law we can give any effect to the arrangement made before marriage with respect to the education of the child, and treat it as binding on the guardian, who stands, (Com. Dig. Guardian, (D),) in *loco parentis*, the admitted object of the present application being, that the child shall henceforth be brought up in the religious faith of the father; or whether we can decline to interfere with the present custody of the child on the ground suggested that the change proposed would be prejudicial to her interests. In dealing with questions of this nature the Court of Chancery, exerting the prerogative of the sovereign as *parens patrie*, has assumed a more extensive authority than that exercised by the Common Law Courts, and although that Court, in making any order as to the custody or education of an infant, pays in general the utmost regard to rights and wishes, or assumed wishes, of the father as to the custody and education of his child (*Ex parte Skinner*, 9 J. B. Moore 278; *Hawksworth v. Hawk-worth*, L. R. 6 Ch. 539,) still, in carrying out what was conceived to be the true interests of an infant, an arrangement similar in effect to that in the present case was upheld by that Court. In the case of *Hill v. Hill*, 31 L. J. Ch. 505, a Roman Catholic, who lived until his eldest child was seven, and had allowed the mother, a Protestant, to have exclusive charge of the education of the children during his life, and they with his full knowledge were brought up in the Protestant faith was held to have abdicated his right to direct their religious education, and in ordering a scheme to be settled for their education the Court disregarded a direction in his will that they should be brought up in the Roman Catholic faith. The Courts of Common Law, however, have always declined to give effect to any mere arrangement or consent on the part of the father disposing of the custody of his infant child, and have felt bound notwithstanding, to enforce the right of the father when asserted. In the case of *Reg. v. Smith*, 22 L. J. Q. B. 116, it was held by Earle, J., in the Bail Court, that a contract, by the father of a child with the third person that the latter should have the custody of the child, was in the nature of a mere consent, and might be revoked by the father, and that he was entitled by a *habeas corpus* to have the child delivered over to him. Indeed it appears to have been the invariable practice of the Common Law Courts on an application for a *habeas corpus* to bring up the body of a child detained from the father (and the case would be the same as to a testamentary guardian) to enforce the father's right to the custody even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or of contamination, in consequence of his immorality or gross profligacy. If the infant be of an age to elect for itself, the Court will merely interfere so far as to get it free from illegal restraint without handing it over to anybody. This was the course adopted in *Rex v. Delaval*, 3 Burr. 1435, in the case of a girl eighteen

years of age, who was delivered from a custody considered illegal, and left at liberty to go where she pleased. But in the absence of any right of choice, the Court goes further, and transfers the infant to the proper legal custody. The right to such an election it has now been clearly decided depends upon age alone, and not on mental capacity; see *Reg. v. Clarke*, 7 E. & B. 186; 26 L. J. (Q. B.) 169, and it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen; *Reg. v. Howes*, 2 E. & E. 332; 30 L. J. M. C. 47, followed by the Court of Probate and Divorce, in the cases of *Cartlidge v. Cartlidge*, 2 Sw. & Tr. 567. 31 L. J. (P. & M.) 35, and *Mallinson v. Mallinson*, L. R. 1 P. & D. 221. The principle on which this Court acts in handing over to the parent or guardian an infant too young to make choice as to its custody, is well explained by Coleridge, J., in *Rex v. Greenhill*, 4 A. & E. 624, at p. 643. He says:—'Where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists; and where the child is in the hands of a third person that presumption is in favour of the father. But although the first presumption is that the right custody, according to law, is also the free custody, yet if it be shewn that cruelty or corruption be apprehended from the father, a counter-presumption arises.' These views were adopted and acted on by this Court in the subsequent case of *Rex v. Isly*, 5 A. & E. 441, where upon a habeas corpus obtained by testamentary guardians appointed by the father's will, two children, too young to make choice for themselves, were removed from the custody of the grandfather and grandmother, and directed to be handed over to the guardians, although the grandparents had, at the request of the father, on the occasion of his wife's death, come over from America at considerable expense and sacrifice and settled in England, for the express purpose of taking care of the children, who had continued under their care for a period of about four years. The same rule as to the paramount right of the father in the view of a Court of Common Law, was also expressed by the Court of Common Pleas in the case of *re Hakewell*, 12 C. B. 223, and fully approved by this Court in the case of *Reg. v. Clarke*, 7 E. & B. 186; 26 L. J. (Q. B.) 169, already cited. It is with great regret, that we therefore feel ourselves bound to hold, that, assuming the validity of the guardian's appointment, and notwithstanding the lateness of the application, and the apparent harshness of such a proceeding towards the grandmother of the child, we have no discretion to refuse the writ, and we should be bound to hand over the child to the custody of the guardian, as the only custody legally free from restraint."

A bill was then filed in the Court of Chancery and it was there held that an ante-nuptial agreement, that the children shall be brought up in a different religion from that of the father, is not binding at law or in equity; but such an agreement will have weight with the Court in considering whether the father has abandoned his right to educate his children in his own religion. Where a father has not forfeited or abandoned his right to educate his children in his own religion, the Court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy and contented, or better provided for, if left with those who have had the care of it. But if a father has forfeited or abandoned his right to educate his children in his own religion, the Court will consider only the happiness and benefit of the child, and will order it to remain in the care of those whom by it has been brought up, and to be educated in their religion, although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training, *Andrews v. Salt*, L. R. 8 Ch. App. 622., and under the circumstances of the case (for which see the case) the Court thought that the infant should be allowed to remain with her mother and to be brought up in the Protestant religion.

*The Court of Chancery did not act merely upon what it considered to be for the benefit of the infant.* In *re Carswell*, 6 P. R. at p. 241, Gwynne, J., said:—"The Court of Chancery never did assume the jurisdiction to remove the children from the custody of the father, upon the ground merely that it might be more for their benefit to be with their mother; nor upon the ground of the religious opinions of the father, except so far as the law of the country regards some religious opinions as dangerous to society, or as inculcating immorality and vice. (See *Shelly v. Westbrook*, Jacob, 266.) Sir R. T. Kindersley, V.C., in *Curtis v. Curtis*, 5 Jur. N. S. 1147, says:—"This Court (of Chancery) does not exercise the jurisdiction in merely considering whether it would be for the benefit of the children that their custody should be with the father or with the mother, or with some other relative, or with strangers, simply because, upon the whole, it would be most for the benefit of the children that there

should be that custody. I repudiate all such jurisdiction as belonging to this Court. If such a jurisdiction existed, I suspect that the peace of half the families in this country would be disturbed by applications, shewing or attempting to shew, what I am afraid might be shewn in a great many cases, that it was most for the interest of the children that they should be removed from the custody, both of the father and the mother.' And, again, 'it appears to me the Court ought never to interfere, unless in some very material and important respect it is essential to the welfare and well being of the children, either physically, intellectually or morally, that it should be so.' Then he says:—'The cases which have most frequently occurred of the Court exercising it, have been cases where the father being of a perverted condition of mind in respect of religious and moral views or habits, is inculcating such habits, or such views and opinions, upon his children in such a way as that it will be most grievously and seriously detrimental to them in after life as members of society. The Court will also interfere unquestionably where the father, although he may not in the smallest degree tend by his teaching or his example to demoralize the children, does treat them with such a degree of violence or harshness and cruelty, as that he appears utterly unfit to have the conduct or management of children.' And, again, with reference to the religious opinions of the father, he says:—'Now one thing is pretty evident, namely, that during the period of the married intercourse between these two parties, there have been differences of opinion upon religious questions, the most unfortunate sort of differences that can arise, I apprehend, between husband and wife, especially where neither the husband nor the wife seems much disposed to submit his or her opinion to the opinion of the other. Suppose the father entertains the opinion which I believe is entertained by a certain section of individuals called 'Separatists', who deny that they belong either to the Church of England, the Church of Rome, the Baptists, the Anabaptists, the Anti-Pedobaptists, the Independents, the Wesleyans, or to any denominations whatever, who call themselves Christians, and assert and believe in all the truths of the Bible, but insist that there should be no church, that every man should be his own priest, having his own place of worship, and that there should be no creed whatever by which persons might express their religious opinions. There are persons of respectability who bring up their children with these views, but nobody would suggest that they are not fit to have the care of their children.' But see *post* in notes to the Ontario Statute.

In that case (*re Carswell*) it was held that it is not sufficient for the mother, claiming children as against their father, to allege that he holds what she calls dangerous and fanatical religious views (in this case those of the "Swedenborgians"), nor will a child, even though within the years of nurture, be delivered up to the mother under Con. Stat. U. C., cap. 74, sec. 8, unless she establishes such a case as would justify her in leaving her husband's home. See also *re Leigh*, 5 P. R. 402.

*R. S. O., c. 130, s. 1 enacts* that any of the Superior Courts of Law or Equity, or any Judge of any such Courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such Court or Judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such Court or Judge thinks convenient and just, and if such infant is within the age of twelve years may make order for the delivery of such infant to the petitioner to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such Court or Judge may direct, and such Court or Judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of such father, or the value of such estate, such Court or Judge thinks just and reasonable. And sec. 4:—No order directing that the mother shall have the custody of, or access to, an infant shall be made by virtue of this Act in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband against any person.

It was held in *re Leigh* 5 P. R. 402, that the Statute in question does not take away the Common Law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it in some degree also to the interests of the child. If, therefore, upon an application of this kind, it appears that the husband and wife are living apart, the Court will enquire into the cause of their separation, in order to ascertain (1) whether the husband has forfeited, by breach of his marital



duties, this *prima facie* right to the possession of his child; (2) and whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the Statute, which was intended "to protect wives from the tyranny of their husbands who ill use them."

In *re Davis*, 3 Ch. Ch. R. 277, where the mother petitioned that the child, who was seven years of age, might remain in her custody, and that the father might pay for the child's maintenance, the parents were living apart, and the only evidence that this was the fault of the husband was an affidavit of the wife. Mowat, V. C., said:—"According to the construction which the Imperial Act, 2 & 3 Vic., Ch. 54, has received, it must be considered that, under our Act, the Court has an absolute discretion to give the custody of children under twelve to the mother, *Shillito v. Collet*, 8 W. R. 683; S. C. *ib.* 696; *Warde v. Warde*, 2 Ph. at 791. In the exercise of this discretion, where the parents are living apart through the fault of the husband, the custody of the children is generally given to the mother, *re Tomlinson*, 3 D. & Sm. 371. But it has been held, that, to justify an order to that effect, where the living separate is the voluntary act of the wife, it is not indispensable that there should be proof satisfactory to the Court that she is living separate for reasons which, in England, would entitle her to a divorce either *a vinculo* or *a mensa et thoro*, *re Bartlett*, 2 Coll. 661. One object of the Act has been explained to be the protection and interest of the children, *re Halliday*, 17 Jur. 56. *Curtis v. Curtis*, 5 Jur. N. S. 1147, in which a general jurisdiction to that effect was disclaimed by the Vice-Chancellor, was not a case under the Act, the children there being over seven years old, the age to which the English Act is limited." And again:—"Where the Court is not satisfied that the separation was unjustifiable on the part of the wife, but she has not been able to prove by independent evidence that there were facts which justified it, what then? Is the position of a wife and child, under the Act, helpless, wherever, for example, the husband's misconduct is concealed from third persons? I am not prepared so to hold. I think that it will be a more sound rule for the exercise of the discretion which belongs to me in this jurisdiction, and that it will be in accordance with the decided cases, to say, where the Court is satisfied that it will be for the interest of the child to be in the custody of the mother, that the Court may in its discretion, in view of all the circumstances, direct the custody to be given to the mother in case the cause of her living apart is, on her own statement, justifiable, and the Judge is not prepared to say that he disbelieves that statement. Every case must depend on its own circumstances."

See also *re Allen*, *Regina v. Allen*, 31 U. C. R. 458; 5 P. R. 443 453; *re Carswell*, 6 P. R. 240; *re Ross*, 6 P. R. 285; *Davis v. McCaffrey*, 21 Gr. 554; *Munro v. Munro*, 15 Gr. 431; *re Smith*, 8 P. R. 23; *re Scott*, *ib.* 58; and as to illegitimate children, see *re Brandon v. Beasley*, 7 P. R. 347.

- (10) Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

See notes to sec. 12.

*Rules of Equity.*—In *Grant v. Holland*, *Ross v. Grant*, L. R. 3 C. P. D. 180, it was held that the conflict between the practice in Equity and at Law upon changing solicitors in a suit must be now determined in favour of the Equity practice. In that case Lindley, J. said:—"The question then is reduced to the construction of sub-s. 11 of s. 25 of the Judicature Act, 1873, which provides that in all matters in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail. I do not know why the practice with regard to the changing of solicitors should not be a 'rule of equity.' The general scope of the Judicature Acts is that there should be one uniform administration of justice in the High Court of Justice, as was laid down by the Court of Appeal in *Bustros v. White*, L. R. 1 Q. B. D. 423. Unless there be something to preclude it the rules of Equity are in all cases to prevail." And see *Smith v. Day*, W. N. (1881) 38.

### PART III.

## SITTINGS AND DISTRIBUTION OF BUSINESS.

### HIGH COURT.

18. The division of the legal year into terms shall be abolished so far as relates to the administration of justice; and there shall not be terms applicable to any sitting or business of the High Court of Justice, or of any commissioners to whom any jurisdiction may be assigned under this Act, or of any commissioners of assize; but in all cases in which, under the law now existing, the terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority.

See Imp. Act of 1873, s. 26, first part; R. S. O., c. 41, s. 12; G. O. Chy. 413.

The sittings of the Courts and the vacations are provided for by O. LVII. There are to be three sittings, Michaelmas, from third Monday in November until the Saturday of the second week thereafter; Hilary, from the first Monday in February until the Saturday of the following week; and, Easter from the third Monday in May until the Saturday of the second week thereafter, but the Judges may shorten these to any period not less than two weeks, or increase the length of the sittings to any period. *Ibid.* r. 1. The provisions of the Order do not apply to the Chancery Division except when the Judges of that Division are of opinion that the business is such as to render these provisions necessary or convenient for its due despatch.

As to the Legal Terms heretofore in the Common Law Courts, see R. S. O., c. 39, ss. 11 to 15; and as to the sittings of the Court of Chancery, see Chan. Con. Gen. Ord. 413, 414; Gen. Ord. 590 to 593. The Courts of Assize, Nisi Prius, Oyer and Terminer, and General Gaol Delivery for any county were not put an end to by the commencement of a Term of the Superior Courts of Common Law, R. S. O., c. 41, s. 12.

19. Subject to Rules of Court, the High Court of Justice and the Court of Appeal, and the Judges thereof respectively, or any such commissioners as aforesaid shall have power to sit and act, at any time and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or commissioners, or for the discharge of any duty which by any Statute, or otherwise, is required to be discharged during or after term.

See Imp. Act of 1873, s. 26, second part; R. S. O., c. 41, s. 12.

20. The Lieutenant-Governor in Council may from time to time, upon any report or recommendation of the Council of

Judges of the Supreme Court hereinafter mentioned, make, revoke or modify, orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act.

See Imp. Act of 1873, s. 27; first part.

Con. Gen. Chy. Orders as to vacations are as follows:—

421. The long vacation is to commence on the 1st day of July, and to terminate on the 21st day of August in each year.

422. The Christmas vacation is to commence on the 24th day of December, in every year, and terminate on the 6th day of the following January.

423. The days of the commencement and termination of each vacation, shall be included in and reckoned part of the vacation.

424. The offices of the Court shall be open on every day in the year, except during vacation, and on Sundays, New Year's day, Good Friday, Easter Monday, Christmas day, the days appointed for the celebration of the birthday of Her Majesty, and Her Royal Successors, and any day appointed by Proclamation for a General Fast or Thanksgiving, see R. S. O., c. 1, s. 8, s.-s. 16.

425. During vacation the Court will not sit, and the offices thereof are respectively to be closed, but the offices of the Registrar, and Clerk of Records and Writs are to be open for all purposes of making applications for injunctions, and from ten o'clock in the forenoon, till twelve o'clock noon, each day, for such proceedings as do not require the attendance of the opposite party.

As to vacations in Common Law Courts, see R. S. O., c. 39; ss. 20, 48; c. 50, ss. 68, 95.

As to sittings of vacation Judges, see sec. 21; O. LVII, rr. 2, 3, 4.

**21.** Provision shall be made by Rules of Court for the hearing, in Toronto, during vacation, by Judges of the High Court of Justice and the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard.

See Imp. Act of 1873, s. 28; Order LVII, post.

**22.** Commissions of assize or any other commissions, either general or special, may be issued, by the proper authority, assigning to the persons to be therein named, the duty of trying and determining within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter, depending in the said High Court; or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so issued shall be of the same validity as if it were enacted in the body of this Act; and any commissioner or commissioners shall, when engaged in the exercise of any jurisdiction so assigned to him or them, be deemed to constitute a Court of the said High Court of Justice.

See Imp. Act of 1873, s. 29.

In *Regina v. George Archibald Amer & Laban Amer*, 42 U. C. R. 391, it was held that the Crown, by prerogative right, could issue a Commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer, and General Gaol Delivery, for trial of felonies, &c. *Semble*, per Wilson, J., that such Judge, having by sec. 94 of C. S. U. C., ch. 128, the same powers and duties as a County Judge in Upper Canada, he might have been appointed under C. S. U. C. ch. 11 sec. 2, to act as Commissioner. *Semble*, also, that the Lieutenant-Governor of Ontario, as well as the Governor-General, has the power to issue Commissions to hold Courts of Assize.

In *re Leibes v. Ward*, 45 U. C. R. 375, under the authority of the following deputation:—"Belleville, Ont., 24th July, 1880, I hereby appoint E. B. Fralich, Esq., barrister-at-law, as my deputy, to hold the Second Division Court of the County of Hastings, on Monday, the 26th day of July instant, at the Town Hall, in the Township of Sidney—S. A. Lazier, Junior Judge, C. H." the person therein named tried this case at the time and place appointed, but delivered his judgment, according to a postponement for that purpose, on 2nd August following, at the Judge's chambers in Belleville, outside the limits of the Second Division, but within the County, without having named a day and hour for delivery thereof, in writing at the Clerk's office. Held (1) That the word "Judge" in sec. 20 of R. S. O., cap. 47, includes the Junior Judge, and that the deputation was therefore valid; (2) That the proper construction of the same was, "to hold the Second Division Court of the County of Hastings, to be holden on Monday, &c.," and that his appointment continued until he had performed the purpose for which it was made; (3) That the effect was to clothe Mr. Fralich with all the powers of the Junior Judge during the time of his appointment, wherever he might be within the County. And the rule was therefore made absolute to rescind the order made by Galt, J., for a prohibition, Cameron, J., dissenting.

**23.** All causes and matters in the High Court of Justice shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be determined by any Rules of Court, or orders of transfer, to be made under the authority of this Act. Every document by which any cause or matter shall be commenced in the said High Court shall be marked with the name of the Division to which the same is assigned.

See Imp. Act of 1873, ss. 33 and 42.

**24.** Subject to any Rules of Court and to the provisions of this Act and to the power of transfer, all causes and matters pending in the Court of Queen's Bench at the commencement of this Act are hereby assigned to the Queen's Bench Division of the High Court; all causes and matters pending in the Court of Chancery at the commencement of this Act are hereby assigned to the Chancery Division; and all causes and matters pending in the Court of Common Pleas at the commencement of this Act are assigned to the Common Pleas Division of the High Court.

See Imp. Act of 1873, s. 34.

**25.** Subject as aforesaid, every cause or matter afterwards commenced in the said High Court of Justice shall be assigned to one of the Divisions of the said High Court, by marking the

document by which the same is commenced with the name of such Division.

- (2) All interlocutory and other steps and proceedings in or before the said High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached.

See Imp. Act of 1875, s. 11, sub.s. 1.

**26.** Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred from one Division or Judge of the High Court of Justice to any other Division or Judge thereof, by such authority and in such manner as Rules of Court may direct, or as transfers might be made from one Court to another before the passing of this Act.

See Imp. Act of 1873, s. 36 ; R. S. O., c. 49, 21-29 ; 41 Vic. (Ont.) c. 8, s. 4.

The provisions of the Administration of Justice Act, R. S. O., c. 49, respecting the transfer of causes from one Court to another are as follows :—

Sec. 21.—The Court of Chancery in any suit or other proceeding instituted in that Court shall have jurisdiction in all matters which would be cognizable in a Court of Law ; but in case, at any stage of a cause in Chancery, it appears to the Court or a Judge thereof that the suit or proceeding may for any reason be more conveniently, expeditiously or inexpensively carried on or dealt with in a Court of Law, the Court of Chancery or a Judge thereof may order the suit or proceeding to be transferred to such one of the Courts of Common Law as the said Court or Judge thinks proper ; and such order may be made by such Court or Judge *sua sponte*, or upon the application of either party to the Court or Judge on notice to the other parties interested, and may be made at any stage of the suit or proceeding ; and the Court or Judge may make any order as to costs which seems reasonable.

Sec. 22.—Where an order is made under the foregoing section the proper officer of the Court of Chancery shall annex together all the pleadings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such office of the Court of Common Law as the order directs.

Sec. 23.—If it appears to a Court of Common Law or a Judge thereof that any equitable question raised in any action or other proceeding at Law, cannot be dealt with by a Court of Law so as to do complete justice between the parties, or may for any other reason be more conveniently dealt with in Equity, the Court or Judge may order the action or proceeding to be transferred to the Court of Chancery ; and such order of transference may be made by the Court or Judge *sua sponte*, or upon the application of either party on notice to the other parties interested, and may be made at any stage of the action or other proceeding.

Sec. 24.—Where an order is made under the foregoing section, the proper officer of the Court of Common Law shall annex together all pleadings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such officer of the Court of Chancery as the order directs.

Sec. 25.—Where a transfer has been made under either the twenty-first or the twenty-third section of this Act, the suit, action or other proceeding shall thereafter proceed in the Court to which it has been transferred ; and the Judges of such Court and the officers thereof shall have the same powers and perform the same duties in

relation thereto, and the practice and orders of such Court shall in all respects (or as nearly as may be) apply as if the suit had been originally instituted as an action, suit or proceeding in such Court; but no further or other pleadings shall be necessary than the original pleadings in the Court from which such suit, action or proceeding was transferred, unless especially ordered by the Court or Judge.

Sec. 26.—Where, in the opinion of a Court of Common Law or a Judge thereof, it is necessary or proper in any action to take accounts or make inquiries, which cannot so conveniently or properly be taken or made under the existing practice at Law, or by the means now available for the said Courts, as they might be in Chancery, the Court or Judge may order such accounts and inquiries to be taken and made by the Master or any of the local Masters of the Court of Chancery, instead of ordering a transference of the suit generally to the said Court of Chancery.

Sec. 27.—Where an order is made under the preceding section, the Master to whom the reference is directed shall proceed therein, and all the orders of the Court of Chancery as to the powers of the Master, and as to the proceedings in the Master's office, shall apply thereto, as if the reference had been made by an order of the Court of Chancery.

And see O. S., 41 Vic., c. 8, s. 4, which amends R. S. O., c. 39, and gives the Chief Justices power to transfer causes so as to equalize the business of the two Common Law Courts.

And see O. XLV.

**27.** The Judges to be placed on the rota for the trial of election petitions for Ontario in each year, under the provisions of "The Controverted Elections Act of Ontario," shall be selected out of the Judges of the Supreme Court in such manner as may be provided by any Rules of Court to be made for that purpose; and in the meantime, and subject thereto, shall be selected, as hitherto, that is to say: the members of the Court of Appeal, and of the Queen's Bench, Chancery and Common Pleas Divisions aforesaid shall, on or before the third day of Michaelmas Term in every year, select, by a majority of votes of the members of such Court or Division, one of the Judges thereof: Provided that the Judges who at the commencement of this Act, shall be upon the rota for the trial of such petitions during the then current year, shall continue upon such rota until the end of such year, in the same manner as if this Act had not passed.

See Imp. Act of 1873, s. 38; R. S. O., c. 11, s. 33.

**28.** Every action and proceeding in the High Court of Justice, and all business arising out of the same, except as herein-after provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of, before a single Judge.

See Imp. Act of 1876, s. 17, first part; R. S. O., c. 39, ss. 20-26; c. 50, ss. 281, 282.

- (2) A Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court.

See Imp. Act of 1873, s. 46; Imp. Act of 1875, s. 22; Imp. Act of 1876, s. 17 R. Sup., C. O. 57; R. Sup., C.; Dec., 1876, R. 8.



- (3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court.

See Imp. Act of 1873, s. 39, last part; R. S. O., c. 39, s. 21.

**29.** All business which may from time to time be so ordered by Rules of Court shall be transacted and disposed of by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court.

As to the proceedings which are to be heard and determined before the Divisional Courts, see O. LIV.

- (2) Any number of such Divisional Courts may sit at the same time.

- (3) A Divisional Court of the said High Court of Justice shall be constituted by two or three, and no more, of the Judges thereof; and, except when through pressure of business or any other cause it may not conveniently be found practicable, shall be composed of three such Judges.

The words "and no more" are copied from the English Act and are more applicable to the English Divisional Courts than to those created by the present Act, each of which has three Judges only "and no more."

- (4) Every Judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts.

- (5) But where the Divisional Court is constituted of two Judges only, such Court shall not hear or adjudicate upon any application against the judgment of either of such Judges.

- (6) The President of every such Divisional Court of the High Court of Justice shall be the senior Judge of those present, according to the order of their precedence under this Act or otherwise.

See Imp. Act of 1873, s. 40; Imp. Act of 1876, s. 17; as to precedence see sec. 3, sub-sec. 7.

**30.** Divisional Courts shall, as far as may be found practicable and convenient, include one or more Judge or Judges attached to the particular Division of the said Court to which the cause or matter out of which such business arises has been assigned.

See Imp. Act, 1873, s. 41.

**31.** Subject to any Rules of Court, it shall be the duty of every Judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be deemed necessary for the transaction of the business of any of the Divisions of the High Court;

(a) All such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorized by this Act, and also for the proper transaction of that part of the business of the said Divisions respectively which ought to be transacted by one or more Judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court;

(b) And in case of difference among them, in such manner as a majority of the said Judges shall determine.

See Imp. Act of 1873, s. 41.

In case the Judges are equally divided in opinion the judgment appealed from stands, see *Wyld v. The Liverpool and London and Globe Insurance Co.*, 1 Sup. Ct. R. 604. In that case the Judges of the Supreme Court being equally divided in opinion, and the decision of the Court below affirmed, the successful party was refused the costs of the appeal, but (per the Chief Justice):—"By 38 Vic. c. 11, s. 38, the Supreme Court being authorized, in its discretion to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the Judges. Upon a similar point arising in *Moore v. Connecticut Mutual Life Ins. Co.*, 3 App. R. p. 287, Burton, J. A., stated the practice in the Court of Appeal, as follows:—"As to costs, our practice has been to give costs against the unsuccessful appellant even in cases where he fails by reason of the Court of Appeal being equally divided. If this were a Court of last resort, it is not impossible the judgment of the majority of the Court might have been for a new trial, so as not to conclude the plaintiff. Under these circumstances, we think the proper course is to dismiss the appeal, without costs."

## APPEALS.

**32.** No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court, or Judge, making such order.

See Imp. Act of 1873, s. 49; R. S. O., c. 38, s. 18, sub-s. 3.



*Consent Orders.*—In *Holt v. Jesse*, L. R. 3 Ch. D. p. 182, Malins, V. C., said:—“But as much has been said in the course of the argument, and authorities have been cited about the general principles of the Court in withdrawing consent given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have been cited, that if it should turn out that by the inadvertence of counsel, by the careless consent of the plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such as in the case of *Swinfen v. Swinfen* (2 DeG. & J. 381), where the counsel was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim for an estate in fee simple, he consented that the claimant should have a life estate only, or a tenure for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given. So in the case of *Furnival v. Boyle* (4 Russ. 142-147), which has been cited, Lord Lyndhurst expressly puts it on grounds with which I should most heartily concur, and which I should never hesitate for one moment to act upon, in this way: ‘Mr. Furnival supposed that on his application, stating that counsel were not authorized to consent to the order, the Court would suffer the subject to be again gone into; and he therefore did not, on the former occasion introduce all the circumstances which it now appears he might have brought forward, if it had been then shewn that counsel, when they exercised their discretion, had not those materials before them on which a correct judgment might be formed, the decision of the Court might have been different. It is stated that there is now evidence on affidavit which establishes, or goes far to establish, that point, I therefore think myself bound to suspend the drawing up of the order till the case can be considered in the new form in which Mr. Furnival wishes to present it to the Court; and I do so with the less reluctance, because no inconvenience can arise to the other party from this short delay.’ The cases which have been cited in the Court of Queen’s Bench of *Straus v. Francis* (L. R. 1 Q. B. 379), and *Rumsey v. King* (33 L. T. N. S. 728), are cases undoubtedly carrying this doctrine of a client being bound by the consent of his counsel to a very great length. I do not pretend to say to a greater length than is proper, but certainly to the full length to which it can be carried. The client being present and having full opportunity of knowing what was done, not objecting at the time, it was held that he could not object to those acts to which his counsel agreed. Therefore, I entirely concur with what the Master of the Rolls has said in the passage which Mr. Kokewich has pressed upon me, and I also would desire to say this, that where there has been a misrepresentation on the part of counsel, where the case has been complicated or difficult, where either the materials have not been sufficiently before the counsel, or being before him, he does not fully comprehend them, or may be excused for not having comprehended them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of Rolls: ‘If the counsel says, I made a concession under a misrepresentation, it never has been, and I trust it never will be, the course of the Court to bind the counsel to that mistake.’ I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this Court, and I trust it never will be the rule of this Court that the unfortunate client should be bound by such misapprehension. But here where the whole facts are stated in a page and a half, where the counsel who asks me to decide this do not pretend to say that they were not in possession of every material fact which was necessary to their consent in the case, and the Solicitors do the same, and the defendant himself was in the same position, I think if I were to accede to this application it would be a general license to parties to come to this Court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the Court, because on a future day they find they do not like it. It appears to me that this application is altogether groundless and unjustifiable, and I dismiss it with costs.”

In *Attorney-General v. Tomline*, L. R. 7 Ch. D. 388, Fry, J., said:—“Now the judgment was not drawn up until two or three weeks after it was delivered; and the interval between the pronouncing of a judgment by consent and it being drawn up, gives an opportunity to a person who has consented to anything to ascertain the true state of the facts, and he may in that interval make an application to have the judgment varied. But, in my opinion, when a consent-order has been drawn

up, passed, and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement."

The Court has jurisdiction to discharge an order made on an interlocutory application by consent, when it is proved to have been made under a mistake, though that mistake was on one side only. Where, on motion for a mandatory injunction, an order was made by consent, pursuant to the terms of a previous agreement, by which the defendant gave an undertaking to remove certain obstructions, and it appeared that the defendant had by mistake consented to a more extensive undertaking than he intended to do, the Court refused to enforce that part of the undertaking which had been given by mistake, *Mullins v. Howell*, L. R. 11 Ch. D. 763.

A compromise agreed to by parties in Court, after discussion of the case, with the concurrence of their legal advisers and with the assent of the Court, cannot afterwards be varied on the mere allegation that the consent was given inadvertently, without evidence of mistake or misapprehension, *Davis v. Davis*, L. R. 13 Ch. D. 861.

*Merchants' Bank v. Grant*, 3 Ch. Ch. R. 64, is reported as follows:—"Mr. T. Moss moved on petition to amend the decree in this cause. Mr. J. Hoskin, for the defendant, urged that the decree had been made by consent, and that a consent decree could not be amended or varied, and asked that the petition be dismissed with costs. Mr. Moss, in reply, said that the decree was in one sense only a consent one, it was consented that a decree for foreclosure should be made, but the terms of it were not part of the consent."

A company or corporation may be bound by consent to an order, or by the compromise of an action or claim in the same way as a private person; *Bath's case*, L. R. 8 Ch. D. 334; *Dixon v. Evans*, L. R. 5 H. L. 606, 618.

In the case of infants the Court, though it has power to sanction a compromise on their behalf, see *Hopgood v. Parkin*, L. R. 11 Eq. 80, will not make a decree affecting their interests, by arrangement, unless satisfied that it will be for their benefit.

*Power of Counsel and Solicitor to Compromise an Action.*—As a general rule both the solicitor in the action (not, however, it seems his clerks, unless specially authorized, see *Hodson v. Drewery*, 7 Dowl. Prac. Ca. 569), and counsel have power to bind their client by a contract, or compromise, or abandonment of claim made in Court, unless the compromise includes matters not within the scope of the action, or their authority to compromise has been expressly restricted or prohibited, see *Strauss v. Francis*, L. R. 1 Q. B. 379; *Rumsey v. King*, 33 L. T. N. S. 728; *Butler v. Knight*, L. R. 2 Ex. 109; *re Wood*, 21 W. R. 104; *Thomas v. Harris*, 27 L. J. Ex. 353; *Prestwich v. Poley*, 18 C. B. N. S. 806 (limiting and explaining *Swinfen v. Swinfen*, 2 D. & J. 381; *Fray v. Voules*, 1 El. & E. 839); *Pulling*, 103; *Cordery, Solicitors*, 54.

An agreement entered into by a solicitor that his client's suit should abide the event of a certain other suit by the same plaintiff against another party, such agreement being made without instructions from the client, who afterwards repudiated it, *held*, not to be binding on the client. An affidavit in answer to affidavits filed in reply, filed after an enlargement of the motion was held regularly filed, and allowed to be read, the Court offering to give the other party time to reply to it, if he required to do so, *Dewar v. Orr*, 3 Ch. Ch. R. 224.

*Motion to Commit.*—A motion to commit a defendant for breach of an injunction having been refused without costs, the defendant appealed:—*Held*, that there is no rule that a motion to commit, if refused, must be refused with costs, and that an appeal as to costs in such a case will not be entertained, *Hope v. Carnegie*, L. R. 4 Ch. App. 264.

*Trustees.*—An order that trustees shall pay the costs of a suit personally forms no exception to the general rule that no appeal will be allowed for costs, *Taylor v. Dowlen*, L. R. 4 Ch. App. 697, and see *re Hoskin's Trusts*, L. R. 6 Ch. D. 281, and see O. L. r. 1, quoted *supra*.

*Mortgagee.*—The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established and does not rest upon the exercise of that discretion of the Court which in litigious causes is generally not subject to review. The contract between mortgagor and mortgagee as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordi-

nary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. A decree therefore, in a redemption suit which disallows the costs of the mortgagee, is of right appealable, and if appealed against, can only be supported by proof of special circumstances, sufficient to justify such a departure from the ordinary course of the Court. That there may be such circumstances is undeniable; the question is whether they exist in this case. *Cotterell v. Stratton*, L. R. 8 Ch. App. 295, 302; see, also, *re Rio Grande du Sud Steamship Co.*, L. R. 5 Ch. D. 282, and see O. L. r. 1, quoted *supra*.

*Bankruptcy.*—Rule applies to appeals from decisions in bankruptcy, *Ex parte Ogle*; *Ex parte Smith*; *In re Pilling*, L. R. 8 Ch. App. 711.

*Construction of Decree.*—If costs are given by a decree the question of what costs are covered by the decree may be determined in appeal, *Krehl v. Park*, L. R. 10 Ch. App. 334.

*Appeals upon questions of Costs.*—O. L. r. 1, is as follows:—Subject to the provisions of the Act, the costs of and incidental to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity; Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried or the Court shall otherwise order.

*No order except as to costs.*—An injunction had been granted, and the plaintiff had moved to commit the defendant for breach. Vice-Chancellor Bacon thereupon made an order "That, the Court being of opinion that the defendant, B. Corcoran, has committed a breach of the said injunction, and the plaintiff by his counsel not pressing to commit the said defendant, this Court doth not think fit to make any order on the said motion, except that the defendant do pay to the plaintiff, C. P. Witt, his costs of this application, to be taxed by the taxing master." From this order the defendant appealed. James, L. J.:—"It appears to me quite clear that this case is not one in which there is no appeal. The Acts says that there shall be no appeal for costs where they are in the discretion of the Court, but there is no discretion as to whether a man has or has not been guilty of something alleged against him. The defendant says he has been guilty of nothing, and if the Court had been of that opinion it could not have ordered him to pay the costs any more than it could dismiss a bill and order the defendant to pay the costs of the suit. The Court has made an adjudication, and, as a consequence of that adjudication, has ordered the defendant to pay the costs. If the Court had thought that no contempt had been committed, it could not have ordered the defendant to pay the costs. The defendant must have a right to appeal against that adjudication," Witt *v. Corcoran*, L. R. 2 Ch. D. 69, 70.

The plaintiffs moved to commit the defendant for contempt in having sold certain property of the intestate in the cause in disobedience to an order that she should deliver up to the receiver all property of the intestate in her hands, but the notice did not ask for restitution of the property. The Vice-Chancellor refused to commit, and made the costs of the application costs in the action:—Held that an appeal would not lie from this order, *Ashworth v. Outram*, L. R. 5 Ch. D. 943.

*Dismissal of Bill without costs.*—A Bill was dismissed by a Vice-Chancellor without costs. The plaintiff appealed against the whole decree, and his appeal was dismissed:—Held that the Court had no power to vary the order of the Vice-Chancellor by directing that the bill should be dismissed with costs, *Harris v. Aaron*, L. R. 4 Ch. D. 749. In *Graham v. Campbell*, (L. R. 7 Ch. D. 494) James, L. J., delivering the judgment of the Court, said:—"The dismissal of a bill without costs was pre-eminently the case to which the rule of not hearing appeals for costs applied. And although, by reason of the cross appeal and other matter appealed from, we have had to hear the whole case, the provisions of the Judicature Act do not, in our opinion, allow us to make that a ground for varying the decree as to costs. The inquiry as to damages is a matter wholly collateral, and the failure of the cross appeal leaves the defendant's appeal as to the suit an appeal merely for costs."

*Costs, charges and expenses.*—An order gave a trustee his costs, charges and expenses:—Held that this was not simply an order as to costs within the discretion

of the Court and was therefore subject to appeal, *re* Chennell, *Jones v. Chennell*, L. R. 8 Ch. D. 492.

**33.** No appeal shall lie from the judgment or order of any Divisional Court or Judge of the High Court to the Court of Appeal without the special leave of the Judge or Divisional Court whose judgment or order is in question, or of the Court of Appeal; unless the title to real estate or some interest therein or the validity of a patent is affected; or unless the matter in controversy on the appeal exceeds the sum or value of \$200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

See R. S. O., c. 38, s. 49; C. S. U. C., c. 38, s. 49; Imp. Act of 1873, s. 45.

*Unless the title to real estate or some interest therein is affected.*—These words differ slightly from the words in the Act respecting the County Courts, R. S. O., c. 43, s. 18, which are "in which the title to land is brought in question." Under that Statute there are the following cases in the Ontario Courts. Where in matters of *tor* relating to personal chattels, title to land is brought in question though incidentally, the County Court had no jurisdiction, *Trainer v. Hobcombe*, 7 Q. B. 548.

One H. sold to defendant timber standing on his land, and afterwards conveyed and gave possession of the land to the plaintiff, the defendant proceeded to take off the timber:—Held, that the title to land was not in question, and that an action for trespass to the land would lie in the County Court, *Bailey v. Bleecker*, 5 W. C. L. J. N. S. 99.

Declaration for converting the plaintiff's dwelling house, with the doors and windows, &c. Plea, that the goods were not the plaintiff's. At the trial in the County Court, it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and that the dispute was whether the house was part of the freehold. A verdict having been rendered for the plaintiff, was afterwards set aside, on the ground that the title to the land came in question, and that the case should have been stopped upon the plaintiff's evidence:—Held, that this was right, and the judgment below was affirmed, *Portman v. Patterson*, 21 Q. B. 237.

Title to land does not on mere suggestion, necessarily come in question under a plea of not guilty by Statute. The general rule is that it must not only be pleaded, but be verified by affidavit. In this case, which was an appeal from the County Court:—Held, that though the defendant might have shewn, upon the plea of not guilty, that for want of title the plaintiff could not maintain the action for injury to his premises, yet that in the absence of such proof, or a *bona fide* tender thereof, the mere suggestion if it did not preclude the County Court from trying the real cause of action, which was within its jurisdiction, *Ball v. The Grand Trunk Railway Company*, 16 C. P. 252.

In ejectment in the County Court, under 23 Vic. c. 43, it appeared that the defendant held the land under a verbal lease for a year, from 7th June, from one B., with the arrangement that if B. sold, defendant would give up possession at the end of the year. B. in January, sold to the plaintiff, of which defendant had notice, and promised to give up possession, and the plaintiff gave defendant a notice to quit on 8th June, his term having expired. At the trial, the deed from B. to the plaintiff, and the notice to quit, were proved:—Held, a case within the Statute, that defendant's term was put an end to on the 7th June and that there was no dispute as to title to exclude the jurisdiction, which was clearly not ousted by the mere proof of the plaintiff's paper title, *Neads v. McMillan*, 29 Q. B. 415.

A County Court Judge, at the trial of a case upon the application of plaintiff's counsel, struck out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction by bringing title to land in question:—Held, that he had the power to do so, *Fitzsimmons v. McIntyre*, 5 P. R. 119.

Declaration, that one A. devised the N.  $\frac{1}{2}$  of lot 15 to his son W. in fee, and the S.  $\frac{1}{2}$  to his wife, J., for life, and after death to W. in fee; that during W's life, he and his mother, J., leased to the defendant the whole lot for five years at an annual rent, and W. died soon after, having devised his land to the plaintiffs in fee, and the plaintiffs claimed from defendant a portion of the first year's rent, which they alleged they were entitled to, and which the defendant had paid to J. after notice. Equitable plea, that W. by his will devised all his lands to the plaintiff in trust for the sole benefit of J., during her life, under which she claimed and received from them the rent:—Held, that upon these pleadings the title to land was brought in question, and the jurisdiction ousted, *Fair et al. v. McCrow*, 31 Q. B. 599.

"Exceeds the sum or value of \$200."—The cases shewing the construction placed upon somewhat similar words in the Act respecting County Courts, Con. Stat., U. C. C. 15, s. 34, will be useful in construing these words. That Act after providing in sub-sec. 1 for partnership cases, in sub-secs. 2-5 for administration suits, in sub-sec. 6 for foreclosure or sale suits, in sub-sec. 7 for redemption suits, provides in sub-sec. 8 that the County Courts shall have jurisdiction "where the subject matter involved does not exceed the sum of \$200." The present Act makes no special provision for any class of cases, but provides that there shall be no appeal "unless the matter in controversy or the appeal exceeds the sum or value of \$200."

In a creditor's suit to obtain payment out of land fraudulently conveyed away, the amount due to the plaintiff is the test, and not the value of the property, *Forrest v. Laycock*, 18 Gr. 611.

*Prima facie* the sum realized in a sale under a power contained in a mortgage is the subject matter of the suit. A mortgagee exercised the power of sale contained in his security and realized \$350. In a bill filed by the mortgagor for an account, it appeared that, after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to \$130, the plaintiff was still held entitled to his full costs—"the subject matter involved" being \$350, *McGillcuddy v. Griffin*, 20 Gr. 81.

In a suit by a purchaser asking specific performance of an agreement for the sale to him of lands at the sum of \$150, it appearing that the plaintiff had subsequently erected a house upon the land, increasing its value to more than \$200, it was held that the value of the land at the time of the filing of the bill was the criterion, and not the amount remaining due to the defendant, which was less than \$200, *Kennedy v. Brown*, 6 P. R. 318.

See *Seath v. Milroy*, 2 Ch. Ch., R. 93; *Hyman v. Roots*, 11 Gr. 202; *Goldsmith v. Goldsmith*, 17 Gr. 213, and also *Cotterell v. Stratton*, L. R. 17 Eq. 543; *Paddon v. Winch*, L. R. 20 Eq. 449.

§ 4. In case there has been no difference of opinion among the Judges of the Divisional Court as to any order of such court, made on a motion to set aside or discharge a rule, order, or decision of a Judge, the order of the Divisional Court did not substantially vary the rule, order, or decision moved against, no appeal shall lie from the order of the Divisional Court of the High Court to the Court of Appeal without such leave as aforesaid, unless the title to real estate or some interest therein or the validity of a patent is affected; or unless the matter in controversy on the appeal exceeds the sum or value of \$500, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

See R. S. O., c. 33, s. 49; C. S. U. C., c. 38, s. 49; Imp. Act of 1873, s. 45; see notes to preceding section.

**35.** There shall be no appeal to a Divisional Court from any interlocutory order, whether made in Court or Chambers, in case before the passing of this Act there would have been no relief from a like order by an application to a Superior Court; and there shall be no appeal to the Court of Appeal from any interlocutory order in case before the passing of this Act there would have been, no relief from a like order by an appeal to the Court of Appeal. Any doubt which may arise as to what decrees, orders, or judgments, are interlocutory, shall be determined by the Court of Appeal.

See Imp. Act of 1875, s. 12.

*Interlocutory Order.*—An order giving leave to sign judgment upon a specially endorsed writ is an interlocutory order, *Standard Discount Company v. La Grange*, L. R. 3 C. P. D., 67; so also is an order made in pursuance of an interpleader issue, *McAndrew v. Barker*, L. R. 7 Ch. D. 701. James, L. J., speaking for the Judges of the Court of Appeal, L. R. 1 Ch. D. 41, said that, without at present settling what was an interlocutory order, the Court had determined that all summonses which finally settled the rights of parties, such as summonses under winding-up orders, or in administration suits would be heard by the full Court of Appeal.

An order overruling a demurrer is not an interlocutory order, *Trowell v. Shenton*, L. R. 8 Ch. D. 318.

Where an order embraces a final decree as well as an interlocutory order, see *Cummins v. Heron*, L. R. 4 Ch. D. 787; *White v. Witt*, L. R. 5 Ch. D. 589.

An order made on an appeal from a master's report is an interlocutory order, *Brigham v. Smith*, 3 Ch. Ch. R. 318.

The decision of the High Court upon a special case stated for its opinion by an arbitrator, who is thereupon to make his award, is an interlocutory order, *Collins v. The Vestry of Paddington*, L. R. 5 Q. B. D. 368.

An order varying the certificate of the chief clerk is an interlocutory order, *White v. Witt*, L. R. 5 Ch. D. 589.

An order made on an application by a creditor in an administration suit claiming the proceeds of the sale, was held to be an interlocutory order, although finally determining the rights of the parties, *Pheysey v. Pheysey*, L. R. 12 Ch. D. 305.

When in an action in the Chancery Division, tried by a Judge without a jury, definite issues of fact are settled at the commencement of the trial, the Judge's finding on the facts is an interlocutory order, *Lowe v. Lowe*, L. R. 10 Ch. D. 432.

In an action for an injunction to restrain defendant from building so as to interfere with a right of way claimed by the plaintiff, which right was disputed, the Master of the Rolls found a verdict for the plaintiff as to the right of way, but directed the action to stand over. It was held that the verdict as to the right of way was equivalent to an interlocutory order, *Krehl v. Burrell*, L. R. 10 Ch. D. 420.

An order in a winding up case directing payment of a certain amount to an official liquidator was held not an interlocutory order, *In re Stockton Iron Furnace Company*, L. R. 10 Ch. D. 335.

Judgment by default in an action on a replevin bond is final and not interlocutory, *Dix v. Groom*, 49, L. J. C. L. 430.

The words "interlocutory order" are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after, *Smith v. Cowell*, L. R. 6, Q. B. D. 75.

An order of the Judge at the trial depriving the successful party of his costs not an interlocutory order, *Marsden v. Lancashire and Yorkshire Railway Company*, W. N. (1881) 46.



**36.** Save as aforesaid, every rule, order, or decision made by a Judge of the said High Court in Chambers, except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged upon notice by any Divisional Court; and no appeal shall lie to the Court of Appeal from any such rule, order or decision, unless by special leave of the Judge by whom the same was made or of the Divisional Court aforesaid or of the Court of Appeal.

See Imp. Act of 1873, s. 50; R. S. O., c. 38, s. 16; c. 39, s. 22; c. 50, s. 281, sub-s. 2; sec. 15, *ante*; Order LIV., *post*.

*In the exercise of such discretion as by law belongs to him.*—In the Imp. Act, 1873, sec. 50, the exception is of “orders made in the exercise of such discretion as aforesaid.” This refers to the words in the preceding section: “No order . . . as to costs, which by law are left to the discretion of the Court.”

As to appeals in cases of the exercise of discretion as to costs, see notes to sec. 32. The law prior to this Statute was that there was no appeal from a decision on a question which is, by the practice, purely within the discretion of the Court, *Chard v. Meyers*, 3 Ch. Ch. R. 120; and see R. S. O., c. 38, s. 18, sub-s. 3.

The right of appeal from the Court of Chancery was confined to orders or decrees made in a cause pending between parties. Where, therefore, an appeal was made from an order directing the taxation of a solicitor's bill of costs against his client in a particular mode, the Court of Appeal dismissed the appeal with costs, *re Freeman, Craigie & Proudfoot*, 2 Gr. E. & A. 109.

**37.** Save as aforesaid and subject to the other provisions of this Act, any rule, order or decision of a Judge in Court may be appealed against to the Court of Appeal.

See Imp. Act of 1873, ss. 18, 19, 50; *ante*, s. 13; *post*, s. 34; *post*, Order 54.

This section enlarges the classes of cases in which appeals can be instituted. The jurisdiction of the Court of Appeal prior to this Act was limited by R. S. O., c. 38, s. 18. It is as follows:—“The Court shall have an appellate jurisdiction in both civil and criminal cases; and appeal shall lie thereto from every judgment of any of the Superior Courts, or of a Judge sitting alone as and for any such Courts, in a cause or matter depending in any of the said Courts, or under any of the powers given by ‘The Administration of Justice Act,’ including judgment:—

“(a) Upon any case stated by an Arbitrator, or upon any appeal authorized by law from the decision of any Arbitrator or Referee, or upon any motion to set aside or refer back an award.

“(b) Upon any motion for the issue of a writ of mandamus, or upon any question arising upon the return of such writ; and

“(c) Upon any application for a rule to quash a by-law of a municipal council in whole or in part, whether a rule nisi has been refused, discharged, or made absolute.

“2. No other appeal from a decision of either of the Superior Courts of Law shall be allowed unless the judgment, decision, or other matter appealed against appears of record.

“3. Where a new trial is granted or refused upon matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal shall be allowed.”

**38.** No appeal to the Court of Appeal shall be allowed unless notice thereof is given in writing to the opposite party and to the Clerk of the Crown and Pleas, or Registrar of the



proper Court, within one month after the judgment complained of, or within such further time as the Court appealed from, or a Judge thereof, may allow; nor unless within 3 months after the judgment complained of or within such further time as the Court or Judge aforesaid may allow, the appellant gives proper security to the extent of \$400 to the satisfaction of the Court appealed from, that he will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is in whole or in part affirmed.

This section is a re-enactment of R. S. O., c. 38, s. 26, except that the words "nor unless within three months after the judgment complained of, or within such further time as the Court or Judge aforesaid may allow, the appellant gives proper security," are substituted for the words "nor until the appellant has given proper security."

Under the Rev. Stat., however, the word "judgment" probably meant, not the judgment which was entered in the cause, but the judgment which was delivered by the Judge, *Rose v. Hickey*, 7 Pr. R. 390. In this Act, however, the word *judgment* is to include *decree* (sec. 91), and its meaning in this section may be the entering up of the judgment, or the issuing of the decree. See G. O. Chy., Orders, 324, 325.

*Time for appealing—Refusal of Application at Trial for leave to amend Pleadings.*—At the trial of an action, Fry, J., refused an application made by the defendant's counsel at the Bar, for leave to amend the statement of defence, and His Lordship gave judgment for the plaintiff. In the judgment as drawn up there was inserted, at the express request of the defendant, a recital of the application for leave to amend, and a statement that the Court had refused it. The defendant gave notice of appeal from the judgment, stating the effect of it in his notice, but not referring in any way to the application for leave to amend. The Court held that the refusal of leave to amend having taken place at the trial, it formed part of the judgment, and the appeal from the judgment included an appeal from the refusal. The Court of Appeal would have full power to give leave to amend on the hearing of the appeal, if they should be of opinion that the leave had been wrongly refused. Jessel, M. R., added that it was contrary to the practice to mention the refusal of the application for leave to amend in the judgment, *Laird v. Briggs*, W. N. (1881) 30.

*Leave to Appeal after time expired.*—On an application for leave to appeal after the expiry of the proper time, "the grounds for relief must be such as to satisfy the Judge that the delay was caused by special circumstances which would make it unreasonable to impute it to negligence on the part of the appellant, and which would deprive the respondent of reasonable ground for complaining that, by allowing further time, he has, in an arbitrary manner, been deprived of the advantage of his position," per Patterson, J. A., in *Jarvis v. Stinson*, Feb., 1879.

In *McAndrew v. Barker*, L. R. 7 Ch. D. 705 the Master of the Rolls said: "The Court has no discretionary power to deprive a litigant of any advantage given him by the General Orders unless there has been, on his part, some conduct raising an equity against him," and see *re Mansel*, *Rhodes v. Jenkins*, L. R. 7 Ch. D. 711. This language was, however, disapproved of in *re Blyth and Young*, L. R. 13 Ch. D. 416, where James, L. J., said "With regard to *McAndrew v. Barker*, I wish to say that I think it was a little too strong to say that the Court has no discretionary power to enlarge the time for appealing unless there has been conduct on the part of the respondent raising an equity against him. The Court did not intend to lay down a positive rule in every case; it was not intended, for instance, to apply to the case of inevitable accident."

In *Craig v. Phillips*, L. R. 7 Ch. D. 249, it was held that the mere fact that the Court of Appeal had come to a different opinion upon a doubtful point of law was not sufficient reason for enlarging the time for appealing.

*Slip of Solicitor.*—The authorities are far from consistent upon the question as to whether a slip upon the part of a solicitor will be a sufficient ground upon which to apply for leave to appeal after the usual time has expired. In all such cases the granting of the order is in the discretion of the Judge applied to, and some of the Judges incline to strictness and some to indulgence. In the *International Financial Society v. Moscow Gas Company*, L. R. 7 Ch. D. 241, it was held that the mere fact that an appellant has misconstrued one of the rules, and by reason of such mistake has omitted to bring his appeal in time, is not a sufficient ground for enlarging the time for appeal, and see *Rhodes v. Jenkins*, L. R. 7 Ch. D. 711; *Highton v. Treherne*, W. N. (1878), 227. In the *Ambrose Lake Tin and Copper Company*, L. R. 8 Ch. D. 643, however, a contributory, on the 29th of March, being twenty-one days from the pronouncing of a refusal to remove his name from the list, gave fourteen days' notice of appeal. On the 1st April, conceiving that he ought to have given only a four days' notice, he withdrew his notice of appeal, and on the following day gave a four days' notice of appeal. On the hearing of the appeal, the objection was taken that it was too late:—Held, that the time ought to be extended. Thesiger, L.J., in giving judgment, said: "In my judgment, the fact adverted to by Lord Justice Cotton, makes a very material distinction between this case and the *Moscow Gas Company's* case, upon which reliance has been placed. There the party had allowed the whole of the year to elapse, and he then found that he had made a mistake, and was just beyond the year. There, if I may use the expression, nothing had been rightly done within the period. Here, undoubtedly, a proper notice was given within the period of twenty-one days.

In *re Sceptre and Licensed Victuallers' Fire Insurance Company*, W. N. (1879) 6, a letter advising of an intention to appeal had been written, but no notice given within the proper time. Upon a motion for leave to appeal the letter was admitted but there was no affidavit or any other special circumstance. It was suggested that the delay arose from a mistake of the solicitor. James, L. J., said that in his opinion no special circumstances had been shewn. It had been expressly decided that a mere mistake of the solicitor as to the practice was not sufficient. But here there was no affidavit at all as to the circumstances. Baggallay, L. J., concurred. Bramwell, L. J., agreed that no reason had been shewn for granting an indulgence in the present case; but said that he should be differing from an opinion which he had often expressed if he did not say that when he was satisfied that a mistake had been made, and that there was no *mala fides*, and that no injury had been done to the other side which could not be compensated by payment of costs or otherwise, he thought an indulgence ought to be granted; but there were decisions on the point which could only be altered by the House of Lords.

In *Winnett v. Renwick*, 6 P. R. 233, Blake, V. C., said:—"The only ground on which the application is supported is that through 'an oversight and inadvertence on the part of the solicitor of the defendant, the time for rehearing was allowed to pass.' It is true that in some cases the Court looks at the fact that the reason for asking an indulgence arises from the act of the solicitor and not of the client, and, where an injury of a serious nature would then arise to the party applying, relaxes rules and orders which would otherwise be the means of working a great wrong. But, although this is an element for consideration where an application of this nature is made, I do not think, standing alone, that it affords a sufficient reason for granting such an order as that asked. Very special circumstances from time to time arise, when it may be proper to make an exception in favour of an applicant; but where these are not presented to the Court, if the client is aggrieved through the 'oversight' or 'inadvertence' of the solicitor, the injury received must be arranged between the client and his solicitor, and cannot be made a reason for the other party to the litigation being kept before the Court another six months, and having the enjoyment of the right, to which he has been declared entitled, postponed for this period."

In *Gordon v. Great Western Railway Company*, 6 P. R. 300, Harrison, C. J., said:—"The delay in the application here is about a month after the expiration of the fourteen days allowed by the Statute for that purpose. The ground alleged is that there was an 'oversight.' But it is not stated whose oversight it was; nor is the oversight in any manner explained or excused. Assuming that the oversight was that of the solicitor for the defendants, *Watson v. Lane* 25 L. J. Ex. 240, is an authority to shew that the ground alleged is not sufficient for the granting of the application. However, if the case were one involving a difficult question of law, and one about which the two Superior Courts of Law were at variance, I should feel inclined to grant the relief asked, although the affidavits are anything but satisfactory."

In *Burgoine v. Taylor*, L. R. 9 Ch. D. 1, a defendant was not represented at the trial, because his solicitor had watched, through mistake, the list of the wrong Judge:—Held by Fry, J., that the solicitor had been guilty of gross negligence, and that the judgment which had been given for the plaintiff could not be set aside. On appeal, however, this judgment was overruled, Jessel, M. R., saying:—"We think that the order asked for by the defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in my branch of the Court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty; still, as the defendant was in default, he must pay the costs of the application to the Court below, but no costs of the appeal."

In *Gould v. Rich*, 8 P. R. 343 (note), vacation had been extended until 1st September, and the solicitor supposing that the vacation ran for all purposes, and that he had till after 1st September to set down the appeal from the report, did not set the same down. On discovering his error he applied before the time had elapsed when the case would have been argued, had it been set down properly, for leave to set it down *nunc pro tunc*, or for time to be extended. The referee allowed the application. Hoyles appealed. On appeal, Spragge, C., reversed the order of the referee.

In *Dunnard v. McLeod*, 8 P. R. 343, where a solicitor's clerk, through forgetfulness, neglected to set down an appeal as required by G. O. 642, the Referee refused to extend time for appealing; and, on appeal, Spragge, C., upheld his ruling. The case of *Burgoine v. Taylor* (*ante*) having been cited, Spragge, C., remarked upon the variability of the recent English practice, and declined to follow the case. He held, that as the ultimate object of this motion was to secure the dismissal of the plaintiff's bill, he did not feel bound to grant to defendant the indulgence asked.

See also the judgment of Spragge, C., in *Rose v. Hickey*, 7 P. R. 390, where the stricter rule, as laid down in the cases in L. R. 7 Ch. D. (*ante*), having been cited, that learned Judge said:—"The rule established in the English cases cited by Mr. Hoyles is no doubt a wholesome one, and I am in favour of its being adopted in its spirit here."

See also *Finkle v. Date*, 7 Pr. R. 413; *Robertson v. Robertson*, 7 Pr. R. 418, and the earlier cases; *Tyler v. Webb*, 3 Ch. Ch. R. 33; *Fleming v. Duncan*, *ib.*, 53; *Romanes v. Fraser*, *ib.*, 53; *Cameron v. Wolf Island Canal Company*, *ib.*, 54; *Butler v. Church*, *ib.*, 91; *Chard v. Meyers*, *ib.*, 120; *Duff v. Barrett*, *ib.*, 318; *Davidson v. Boomer*, *ib.*, 375; *re Mullarky*, *McAndrew v. Lafamme*, 6 Pr. R. 95; *Caisse v. Burnham*, *ib.*, 201; *Winnett v. Renwick*, *ib.*, 233; *Nash v. Glover*, *ib.*, 267; *Gordon v. Great Western Railway Company*, *ib.*, 300; *Rowe v. Wert*, 7 Pr. R. 232.

**39.** Save as aforesaid, appeals from the judgments of the High Court or a Judge thereof in civil cases, shall be within the same time and in the same manner and with the same effect as heretofore from like judgments of the Superior Courts or of a Judge thereof.

See R. S. O., c. 38, ss. 45—48.

The times heretofore allowed for appealing to the Court of Appeal have been as follows:—All appeals from a judgment, decision, rule or order of either of the Superior Courts of Law, shall be brought to hearing within one year after the giving of the judgment, decision, rule or order appealed from, or after the entry of the judgment in respect of which error is alleged, or within such further time as the Court of Appeal may allow, R. S. O., c. 38, s. 45. In case of an appeal from the Court of Chancery, the appellant shall bring the same to a hearing if the appeal is from a decree or decretal order, within one year from the pronouncing thereof; and if the appeal is from an interlocutory order, not being a decretal order, then within

six months from the pronouncing of the same, or within such further time in either case as may be allowed for the purpose by the Court of Appeal, upon special grounds shewn to the satisfaction of the Court or Judge granting the same, *ib.* s. 46. The time limited for appealing from a decree or order, which, under any General Orders of the Court of Chancery, does not become absolute upon the same being pronounced, shall be computed from the time when the same does become absolute, *ib.* s. 47. In cases not otherwise provided for, an appeal against any judgment shall be commenced and prosecuted with effect within one year after judgment has been entered of record, given or completed, *ib.* s. 48.

As to what are interlocutory orders, see notes to sec. 32.

*Decretal Orders.*—In a case of *Leaming v. Woon*, decided by Mr. Justice Morrison, on 8th March, 1881, the defendant, Mary Gurley, was entitled to a life-estate in the property in question, consisting of realty and personalty under the will of her deceased husband, the plaintiff was a remainder man, and filed his bill to have a receiver appointed on the ground that the estate was being wasted. By the decree on further directions a receiver was appointed, and he was ordered to pay to the defendant, Mary Gurley, the net annual income of the estate. In an action-at-law the Canadian Bank of Commerce recovered a judgment against Mary Gurley for about \$500, upon which they issued a *fi. fa.* against goods and the sheriff returned the writ *nulla bona*. They thereupon filed a petition in this cause against Mary Gurley, and the receiver alleging that they were prevented by the appointment of the receiver from recovering upon their judgment at law, and they prayed for an order directing the receiver, out of the first income in his hands, payable to Mary Gurley, to pay their debt. This petition was dismissed with costs by the Court of Chancery in June, 1880. Notice of appeal was duly served and filed under the Statute, but no steps were taken towards the prosecution of the appeal until February, 1881, when security was given and a draft case and reasons for appeal were served upon the solicitors for Mary Gurley. They objected that the order appealed from not being a decretal order the time to appeal under the Statute had passed, and asked to have the appeal dismissed with costs, but Morrison, Justice, refused so to hold and directed that the appeal proceedings should be allowed to be prosecuted without prejudice to the right of the respondent to take that objection before the full Court.

In *re Markham*, *Markham v. Markham*, L. R. 16 Ch. D. 1, leave was given, *ex parte*, to a person interested in, but not a party to an action, to appeal from an order.

The following are the General Orders of the Court of Appeal, which were promulgated on 30th March, 1878:—

I. Upon, from and after this date, all Rules and Orders heretofore made, and now in force regulating the practice and proceedings in civil causes in this Court are annulled, except the rules now in force respecting appeals to Her Majesty in Privy Council; and the following Orders made under the authority of the Court of Appeal Act are substituted for the same.

II. Unless otherwise especially ordered by the Court appealed from or a Judge thereof, the security required by sections 26 and 27 of the said Act shall be personal and by bond, and may be in the form given in the Appendix, *mutatis mutandis*. (Form A): Provided that in any case in which execution may be stayed on the giving of security under section 27, such security may be given by the same instrument whereby the security prescribed in section 26 is given.

III. The bond shall be executed by the appellant or appellants, or one or more of them, and by two sufficient sureties, unless such Court or Judge shall think fit to dispense with the execution thereof by the appellant.

IV. When the judgment appealed from directs the payment of money, the security required by section 27, sub-section 4, shall be in double the amount so directed to be paid; provided always that, in cases where the security to be given shall be in a sum above two thousand dollars, it shall be in the discretion of the Court appealed from, or of a Judge thereof, to allow security to be given by a larger number of sureties, apportioning the amount among them as shall appear reasonable; and provided further, that, where the amount by the judgment directed to be paid exceeds \$10,000, it shall be in the discretion of such Court or Judge to allow security to be given for such amount less than double as shall appear reasonable.

V. When the judgment appealed from directs the sale or delivery of possession of real property or chattel: real, the security required by section 27, sub-section 3, shall be taken in double the yearly value of the property in question, unless the Court appealed from or a Judge thereof shall otherwise direct.

VI. The parties to every such bond as sureties shall by affidavit respectively make oath that they are resident householders or freeholders in Ontario, and severally worth the sum mentioned in such bond, over and above what will pay and satisfy all their debts; and such affidavit may be in the form given in the Appendix. (Form B.)

VII. The bond with an affidavit of the due execution thereof, and affidavit of justification shall be deposited with the clerk or registrar of the Court appealed from in Toronto, and shall be deemed to be perfected and allowed, unless, within fourteen days after being served with notice thereof, the respondent shall move for its disallowance.

VIII. The appellant may, after such deposit, make a special application before the expiration of fourteen days to stay execution in any of the cases mentioned in section 27 of the said Act.

IX. After the security has been perfected, the appellant shall prepare a draft of the case mentioned in the 31st section of the said Act, and shall submit such draft to the respondent, who shall return the same within four days, with his modifications or suggestions, and in the event of difference, the appellant shall give two days' notice of an application to the Court or Judge, to settle the case, in pursuance of the said section; and if in the opinion of the Court or Judge such application was occasioned by the unreasonable conduct of either party, such party may be ordered to pay the costs thereof.

X. Where the case has been settled by the parties themselves, no costs shall be taxed, either between party and party, or solicitor or attorney and client, for any matter stated in the case, which was not reasonably necessary to raise the question in appeal.

XI. The appellant shall serve his reasons of appeal along with and as part of the draft case mentioned in the 9th order, and the respondent shall serve his reasons against the appeal, within ten days from such service, or within such further time as a Judge of the Court of Appeal may allow.

XII. If the appeal is from a part only of the judgment, the reasons of appeal shall specify the part.

XIII. If the respondent shall neglect to serve reasons against the appeal, the Court may hear the appeal *ex parte*, and give judgment thereon without the intervention of the respondent.

XIV. Upon being served with the respondent's reasons against the appeal, or upon his having made default in service thereof, the appellant shall cause appeal books to be printed containing the case as settled by the parties or the Judge, and the reasons for the appeal, and the reasons against the appeal, if such latter reasons have been served as aforesaid, and any notice given under the 16th of these orders, and forthwith deliver one of such copies to the registrar by whom the same shall be filed as the stated and settled case, and ten copies for the use of the Judges and officers of the Court.

XV. The respondent may after such book has been delivered to the registrar, apply to a Judge of the Court of Appeal for leave to serve his reasons upon affidavit accounting for the delay, and such leave may be given upon such terms as the Judge may think proper.

XVI. A cross appeal shall not under any circumstances be necessary, but if a respondent intends upon the hearing to contend that the decision should be varied, he shall with his reasons against the appeal give notice of such contention to any parties who may be affected by such contention, and such notice shall concisely state the grounds of such contention in the same manner as reasons of appeal are stated. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may in the discretion of the Court be ground for an adjournment of the appeal or for a special order as to costs.

XVII. The reasons for and against the appeal shall contain a statement of the points of law intended to be argued, and the authorities relied upon.

XVIII. The appeal books shall be printed on paper of good quality, on one side of the paper only, and in demy quarto form with pica type leaded or small

pica type leaded, and every tenth line of each page shall be numbered in the margin. An index to the pleadings, evidence and other principal matters shall be added; but the opinions of the Judges of the Court appealed from shall not be printed where the same have been already issued in the regular reports, but a reference to the same shall be given in the appeal books, and shall be sufficient. The style of the cause in the Court below shall be used and retained in the appeal book and in every proceeding in this Court, the designation "appellant" or "respondent" being added, *e.g.*:

BETWEEN A. B., (*respondent*), PLAINTIFF,

AND

C. D., (*appellant*), DEFENDANT.

XXIX. The registrar shall not file the case without the leave of a Judge, if the preceding order has not been complied with.

XX. If the press has not been carefully corrected the Court may disallow the costs of printing, or may decline to hear the appeal, and make such order as to postponement and payment of costs as may seem just.

XXI. The printed case and the copies thereof for the use of the Court shall be delivered to the registrar within thirty days after the allowance of the security, unless the time shall be extended by the Court of Appeal or a Judge; and in case of neglect or omission by the appellant to comply with this rule the respondent may apply to a Judge upon two days' notice to the appellant for an order dismissing the appeal as for want of prosecution, and the Judge may thereupon make such order as to dismissing the appeal or otherwise as may appear just. [For form of entry of appeal see Form No. 92 in Judicature Act.]

XXII. Appeals shall be entered by the registrar upon the list for hearing at the next regular sittings of the Court which shall commence at least eight days after the receipt by him of the printed copies; and the appellant shall serve the respondent or such respondents as are directly affected by the appeal with notice of hearing at least seven days before the first day of such sittings; and he shall at the same time deliver to the respondent two printed books.

XXIII. If in the opinion of the Court any parties not served ought to be notified, the Court may direct service to be made, and may postpone the hearing of the appeal for that purpose upon such terms as may seem just.

XXIV. If either party neglect to appear at the proper day to support or resist the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon payment of such costs as the Court shall direct.

XXV. Interlocutory applications to the Court or a Judge shall be made by notice of motion supported by affidavit to be filed in the office of the registrar before the notice of motion is served.

XXVI. The notice of motion together with copies of the affidavits filed shall be served at least two clear days before the time of hearing; and in the computation of such two clear days, Sunday or any day on which the offices are closed is not to be reckoned.

XXVII. Admissions of the service of a notice of motion upon the opposite Attorney or Solicitor need not be verified by affidavit; and in no case shall an affidavit of service be allowed upon taxation unless it shall appear that the party served shall, after a demand therefor, have refused to give an admission of such service.

XXVIII. The same fees and allowances shall be taxed in appeal by the registrar, as are allowed for similar services in the Court from which the appeal is brought; and a reasonable sum, not exceeding \$5 in any case may be allowed for correspondence during the progress of the appeal.

XXIX. In ordinary cases the registrar shall not tax larger counsel fees than \$40 to the senior counsel, and \$20 to the junior counsel; and in no case more than \$80 to the senior and \$50 to the junior counsel.

XXX. The registrar shall not tax two counsel fees, except in cases of such difficulty or importance as to render the appearance of two counsel reasonably necessary and proper.

XXXI. Two clear days' notice shall be given to the unsuccessful party or parties of the time appointed by the registrar for the settlement of the certificate,



provided for by the 44th Section of the Court of Appeal Act and the taxation of costs.

XXXII.-XXXIX. related to Insolvency appeals.

### COUNTY COURT APPEALS.

For the purpose of avoiding unnecessary expense in appeals from County Courts, particularly in making copies of papers, it is ordered that:—

XXXIX. *a.* The pleadings, motions, rules, orders and other papers certified to the Court of Appeal, under section 41 of the Act respecting County Courts, shall be the original papers filed in the County Court: and when the evidence has been taken by an official reporter, his transcript of the evidence used or prepared for use in the County Court upon the motion which is the subject of appeal, shall be the evidence so certified.

The said papers, together with the Judge's charge and his judgment or decision, and also the evidence when not taken by an official reporter, and all objections and exceptions to the evidence, shall be fastened together and transmitted with the Judge's certificate to the registrar of the Court of Appeal, who is to return them to the County Court when the appeal is disposed of.

It shall not be necessary to certify or transmit the evidence or the objections or exceptions thereto in any case in which the appeal is from a judgment or decision upon the pleadings or upon any motion not founded upon the evidence.

*This order was promulgated 17th day of May, 1880.*

XI. An appeal shall be set down to be heard at the first sittings of the Court for the hearing of arguments, which shall commence after the expiration of thirty days from the decision complained of.

XLI. An appeal shall be set down for hearing by delivering to the registrar of the Court of Appeal at least eight days before the sitting at which the appeal is to be heard the certified copy of the pleadings, proceedings, evidence and other matters required by section 43 of the Revised Statutes of Ontario, and ten appeal books for the use of the Judges of the Court of Appeal and the Officers of the Court.

XLII. The books shall be printed on paper of good quality, on one side of the paper only, in demy quarto form with small pica type leaded, and every tenth line of each page shall be numbered in the margin, and the statement of the reasons of appeal shall form a part thereof.

XLIII. A full copy of the pleadings shall not be printed in the books, unless it be necessary for the proper consideration of the question raised upon appeal, *ex. gr.* in questions arising on demurrer, or in arrest of judgment, or for judgment *non obstante veredicto*. In other cases it shall be sufficient to state the substance of the pleadings, in a brief form, in accordance with the example given in the appendix, but so as to be intelligible. (Form C.)

XLIV. It shall not be necessary to print evidence which does not bear upon the question in appeal, but the books must always contain the opinion delivered by the Judge in Term, and his charge in case of a trial by jury, and his note of judgment in case of a trial by himself.

XLV. Exhibits used at the trial shall not be printed in the books, unless their contents are material to the question in appeal, and then only such parts as are material; if any instrument or document be unnecessarily printed, the expense thereof shall be disallowed on taxation.

XLVI. All formal matters, such as copies of the motion papers and rules discharging or making rules nisi absolute, shall be omitted, but such reference shall be made to them including the dates thereof, as may appear necessary for giving a clear and intelligible statement of the case.

XLVII. No costs shall be taxed whether between party and party, or between attorney and client for any matter appearing in the appeal books which was not reasonably necessary to raise the question in appeal.

XLVIII. The appellant shall, at least six days before the sittings at which the appeal is to be heard, serve the respondent with notice of the setting down of the appeal and with a copy of the printed appeal book, and of the grounds and reasons



of his appeal. In case the respondent is of opinion that any necessary matter has been omitted, he may at any time before the hearing leave with the registrar a memorandum briefly referring to such omitted matter.

XLIX. Service of all necessary notices may be made either upon the attorney or upon his town agent, in the same manner as if the suit were in one of the Superior Courts.

L. If the foregoing rules are not complied with, the appeal shall not be heard, unless the Court or a Judge shall on application made upon two days' notice to the respondent otherwise order.

LI. The costs to be taxed and allowed upon appeals from County Courts shall be on the same scale as formerly allowed upon appeals to the Courts of Queen's Bench or Common Pleas: And a sum not exceeding in any case \$2.00, may be allowed for correspondence during the progress of the appeal.

LII. All books, as well in Superior Court as County Court appeals, shall contain the date of the first proceeding in the suit or matter; and the dates of the filing of the several pleadings shall be stated at the commencement of the copy or summary thereof. In the event of non-compliance with this rule such books will not be received by the registrar, nor will the appeal be heard.

#### SITTINGS, VACATION, COMPUTATION OF TIME, &c.

LIII. There shall be five sittings in the year for hearing arguments, commencing on the second Tuesday in January, the first Tuesday in March, the second Tuesday in May, the first Tuesday in September, and the second Tuesday in November, or in case any of these days shall be a legal holiday, then on the following day.

LIV. In case of sittings at any other time being deemed necessary or convenient for the despatch of business, due notice of the time of holding the same will be given.

LV. There shall be two vacations, namely: the long vacation commencing on the 1st day of July, and terminating on the 31st day of August, and the Christmas vacation commencing on the 24th day of December and terminating on the 2nd day of January following.

LVI. The days of the Commencement and termination of each vacation shall be included in and reckoned part of the vacation.

LVII. The time of either vacation shall not be reckoned in the computation of the time appointed or allowed by these Orders for any act or proceeding, except in the case of County Court appeals.

LVIII. The Court or a Judge shall have power to enlarge or abridge the time appointed by these Orders for doing any act or taking any proceeding upon special application, and upon such terms as the justice of the case may require.

LIX. In all cases in which any particular number of days, not stated to be clear days, is prescribed by these Orders, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless such last day shall happen to fall on Sunday, or a legal holiday, or non-judicial day.

LX. In all cases expressed to be clear days or where the term "at least" is added, both days shall be excluded.

LXI. In all matters, relating to services of notices, not specially provided for by these Orders, the practice of the Court appealed from shall be followed.

#### PAYMENT OF MONEY INTO AND OUT OF COURT.

LXII. Money ordered to be paid into Court is to be deposited in the Canadian Bank of Commerce at Toronto, with the privy of the registrar and to the credit of the cause or matter.

LXIII. Any person desiring to pay money into Court must file a written request with the registrar for a direction, which the registrar shall give, stating the style of the cause or matter and the amount to be paid in.

LXIV. The person so paying in shall obtain a duplicate receipt therefor, one copy of which shall be filed with the registrar.

LXV. No money is to be paid out of Court except upon an order of the Court or a Judge obtained upon notice to the opposite party.

LXVI. Money is only to be paid out of Court upon the cheque of the registrar, countersigned by a Judge.

## APPENDIX.

### FORM A.

KNOW ALL MEN BY THESE PRESENTS, that we (naming all the obligors with their places of residences and additions), are jointly and severally held and firmly bound unto (naming the obligees with their places of residence and additions), in the penal sum of \_\_\_\_\_ dollars, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors and administrators, respectively, firmly by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_.

Whereas the (appellant) complains that, in the giving of a certain judgment in a certain suit in Her Majesty's Court of Queen's Bench, (or of *Chancery or Common Pleas*, as the case may be,) in the Province of Ontario, between (naming the parties to the cause) \_\_\_\_\_, manifest error hath intervened; wherefore (the appellant desires to appeal from the said judgment to the Court of Appeal.

Now the condition of this obligation is such that if (the appellant) do and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed or in part affirmed, then this obligation shall be void, otherwise to remain in full force.

Signed, sealed and delivered,  
in the presence of \_\_\_\_\_

### FORM B.

*In the (style of Court).*

A. B., plaintiff, } I, E. F., of \_\_\_\_\_, make oath and say, that I  
vs. } am a resident inhabitant of Ontario, and am a householder  
C. D. Defendant. } in, (or a freeholder in \_\_\_\_\_), and that I am worth  
the sum of \_\_\_\_\_, (the sum mentioned as the penalty, or such sum as the  
deponent is bound in,) over and above what will pay all my debts; and I, J. H.,  
of \_\_\_\_\_, make oath and say, that I am a resident inhabitant of Ontario, and  
am a householder in \_\_\_\_\_, (or a freeholder in \_\_\_\_\_), and that I  
am worth the sum (as in the former case) of \_\_\_\_\_, over and above what will  
pay all my debts.

The above-named deponents, E. F. and G. H. were sworn at, &c., the  
day of \_\_\_\_\_ 18\_\_\_\_, before me.

Commissioner, &c.

### FORM C.

Action commenced by Writ dated 2nd January, 1878.

Declaration: *Filed 16th January, 1878.*

1st Count.—Trespass to goods.

2nd " —Common Counts.

Pleas: *Filed 24th January, 1878.*

To 1st Count.

1. Not guilty.

2. Not possessed.

3. Leave and license.

To 2nd Count: *Nunquam indebitatus.*

(Replication and other pleadings to be in similar form, but sufficiently full to be intelligible.)

**40.** Upon the request of the Judge or Judges with or for whom he is requested to sit or act, it shall be lawful for any Judge of the Court of Appeal, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any Division; and while so sitting and acting any such Judge of the Court of Appeal shall have all the power and authority of a Judge of the said High Court.

See Imp. Act of 1873, s. 51; R. S. O., c. 38, s. 9.

See as to a Judge of one Court, sitting as a member of, or for a Judge of another Court or Division, Sec. 29, sub-sec. 4; R. S. O., c. 38, s. 9; c. 39, s. 10; c. 40, ss. 22, 27.

**41.** In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof.

See Imp. Act of 1873, s. 52.

Prior to this Act a single Judge had power to amend the certificate embodying the judgment of the Court, *St John v. Rykert*, per Patterson, J., 1880.

**42.** In case from pressure of business, or other cause, it shall at any time seem expedient to the Lieutenant-Governor in Council, or to the Judges of the Supreme Court, or a majority of them (of which majority two Judges of the Court of Appeal, including the Chief Justice unless absent on leave, shall form part), the Court of Appeal may sit in two Divisions at the same time; and in such case, and to enable two Divisional Courts to be held, the Judges of the said Supreme Court, or the said majority of them, shall select from the Judges of the High Court so many of the Judges thereof as may be necessary, together with the ordinary Judges of the Court of Appeal, to form two Divisions of the said Court, and the Judges so chosen and acting shall have all the power and authority of the Judges of the said Court of Appeal.

(2) Unless otherwise arranged by the Judges of the Court of Appeal and the said Judges so selected, two of

the ordinary Judges of the Court of Appeal shall where practicable sit in each such Divisional Court.

See Imp. Act of 1875, s. 12.

**43.** No appeal shall lie to the Supreme Court of Canada without the special leave of such Court, or of the Court of Appeal, unless the title to real estate or some interest therein or the validity of a patent is affected; or unless the matter in controversy on the appeal exceeds the sum or value of \$1,000, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.

See R. S. O., c. 38, s. 49 : 38 Vic. (D) c. 11, s-s. 17 : 42 Vic. (D) c. 39, s. 8.

This section corresponds in its terms to R. S. O., c. 38, s. 49, which limits the right of appeal, to Her Majesty in Her Privy Council, to cases where the matter in controversy exceeds \$1000. See also 38 Vic. c. 11, s. 17 [D], which limits the right of appeal to the Supreme Court from judgments rendered in the Province of Quebec : and the 42 Vic. c. 42, s. 8 [D].

"*Title to real estate.*"—See notes to Sec. 33.

"*Exceeds the sum or value of \$1,000.*"—See notes to Sec. 33.

## PART IV.

### TRIAL AND PROCEDURE.

**44.** At the trial of any action no party shall be entitled to judgment on the ground of his pleading being true, if the facts proved are not sufficient in point of law to entitle him to judgment.

See R. S. O., c. 49, s. 5 ; R. Sup. C., Dec. 1876, R. 3 ; Imp. Act of 1876, s. 17.

"*Judgment*" includes decree, sec. 91.

**45.** Subject to Rules of Court, in causes and matters which, at the time of the passing of this Act, are within the jurisdiction of the Courts of Law, the mode of trial shall be as now provided by law for like cases in actions in the said Courts of Queen's Bench and Common Pleas ; and, subject as aforesaid, in causes and matters over which the Court of Chancery has, at the time of the passing of this Act, exclusive jurisdiction, the mode of trial shall be according to the present practice of the Court of Chancery.

See R. S. O., c. 49, ss. 4, 31 ; c. 50, ss. 252, 258.

"*Within the jurisdiction of the Courts of Law.*" The jurisdiction of the Courts of Law was much extended by The Administration of Justice Act, 36 Vic., c. 8, now embodied in the R. S. O., c. 49, s. 4. It is as follows:—Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recover may be an equitable one only, and no plea, demurrer or other objection on the ground that the plaintiff's proper remedy is in the Court of Chancery, shall be allowed in such action; but the Court shall have the discretionary power hereinafter mentioned to transfer Equity matters to the Court of Chancery where the ends of Justice so require.

"*As is now provided by law, by jury, or no jury.*" The R. S. O., c. 50, ss. 252—257, contain the practice upon this point. They are as follows:—Sec. 252. In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, all questions which might heretofore have been tried by a jury, shall be tried by a jury, unless the parties in person or by their attorneys or counsel, waive such trial. Sec. 253. All other issues of fact in any civil action, when brought in either of the Superior Courts, or in any of the County Courts, and the assessment or inquiry of damages in every such action, may, and (subject to the provisions of the two hundred and fifty-fifth section) in the absence of such notice as in sub-section two of this section mentioned, shall be heard, tried and assessed by a Judge of the said Courts without the intervention of a jury. Sub-s. 2. If any one or more of the parties desire such issue to be tried or damages to be assessed or inquired of by a jury, he shall give notice to the Court in which such action is pending, and to the opposite party, by filing with his last pleading and serving on the opposite party a notice in writing to the effect following, that is to say:—

"The Plaintiff (or one or more of them or the Defendant, or one or more of them, as the case may be) requires that the issues in this cause be tried (or the damages assessed) by a jury," and a copy of such notice shall be attached to the record.

254. Wherever any one or more of the parties to any such action have given such notice requiring a jury as hereinbefore provided, the cause shall be carried down to trial in the same manner and with the like effect as if section 253 had not been passed, and (subject to the provisions of section 255) the issues of fact therein shall be tried and determined or assessed by the unanimous verdict of twelve jurors duly sworn for the trial of such issues or for the assessment of such damages.

Sub-s. 2. The parties present at the trial may consent that the said notice shall be waived, and the case tried and damages assessed by the Judge, and may endorse a memorandum of such consent upon the record, and thereupon the Judge shall proceed to the trial of the issues or assessment of the damages without the intervention of a jury.

255. Notwithstanding anything in the two next preceding sections contained, the Judge presiding at the trial may in his discretion direct that any such action shall be tried or the damages assessed by a jury; and upon application to the Court in which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without the intervention of a jury.

256. The verdict or finding of the Judge by whom any issue is tried or damages assessed shall have the like effect as the verdict or finding of a jury, and the like fees and charges shall be payable in respect of the same.

257. Where in any action equitable issues are raised by the pleadings or defence, they shall be heard and tried, and the assessment or inquiry of damages, if any, incidental thereto shall be assessed and inquired of by the Court, or a Judge, without the intervention of a jury; but it shall be competent for the Court, or Judge, upon the application of either party, supported by sufficient reasons, to order such issues to be tried or damages assessed by a jury.

And see O. XXXI, r. 4, by which every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges.

*Superior Courts and County Courts.*—In certain cases Superior Court actions may be tried at the County Courts, and in certain others County Court actions may be tried at the sittings of Assize and *Nisi Prius*. R. S. O. c. 49, ss. 31-44 contain the law and are as follows:—

Sec. 31. All issues of fact and assessment of damages in the Superior Courts of Common Law relating to debt, covenant and contract, where the amount is liqui-

dated or ascertained by the signature of the defendant, may be tried and assessed in the County Court of the county where the venue is laid, if the plaintiff desires it, unless a Judge of such Superior Court otherwise orders, and upon such terms as he deems meet.

Sub-s. 2. In such case the record shall be made up, and entered as in other cases, except that an entry shall be made therein, and in the subsequent proceedings in the words or to the effect of Form 1, in the schedule to this Act, in place of the *venire facias*; and the trial shall take place in the same way as in ordinary cases in such County Court; and in the roll the *postea* shall be entered in the words or to the effect of Form 2 in the said schedule.

Sub-s. 3. In any action depending in either of Her Majesty's Superior Courts of Common Law, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of either of the said superior Courts is satisfied that the case may safely be tried in a County Court, any Judge of either of the said Superior Courts may order that such case shall be tried in the County Court of the county where such action was commenced, and such action shall be tried there accordingly, and the record shall be made up as in other cases, and the order directing the case to be tried in the County Court shall be annexed to the record, and the trial shall take place in the same way as in ordinary cases in such County Court.

Sec. 32. By the order of a Judge of either of the Superior Courts of Law, made upon such terms as the Judge may consider just, the issues of fact and assessment of damages in any action pending in a County Court may be tried and assessed at the sittings of Assize and *Nisi Prius* for any county.

Sub-s. 2. In such cases the record shall be made up and entered and the case tried as in ordinary cases, and the *postea* shall be entered in the roll in the words or to the effect of Form 3, in the schedule to this Act.

Sec. 33. In any of the cases in the two next preceding sections mentioned, the notice of trial or assessment of damages shall state that the cause will be tried, or the damages assessed at such sittings according to the fact; and in cases in the Superior Courts, where the trial or assessment is intended to be had in the County Court, under sub-section 1 of the thirty-first section, the notice of trial or assessment shall be served ten clear days before the sittings of such County Court.

Sec. 34. Nothing herein contained shall prevent a Judge of the Court in which the action is brought, or, after the record is entered for trial or assessment, the Judge before whom the trial or assessment is intended to be had, from entertaining applications to postpone such trial or assessment.

Sec. 35. Subject to the provisions herein and in sections two hundred and eighty-five and two hundred and eighty-six of "The Common Law Procedure Act," contained, judgment in any of the said cases may be entered on the fifth day after verdict rendered or damages assessed, unless the Judge who tries the cause certifies on the record under his hand that the case is one which in his opinion should stand to abide the result of a motion that may be made therein in term, or unless a Judge of one of the Superior Courts otherwise orders; but in any such case, the Judge may certify for immediate execution.

Sec. 36. Any motion to be made in respect to the trial, verdict or assessment of damages in a Superior Court case tried or assessed at the sittings of any County Court, shall be made in the Superior Court in which the action was brought.

Sec. 37. Any motion to be made in respect to the trial verdict or assessment of damages in any County Court cause had, tried or assessed at any sittings of Assize and *Nisi Prius*, shall be made, heard and determined in such one of the Superior Courts of Law at Toronto as the party moving or applying elects, and according to the practice of that Court; and any rule or order made in such cause by such Court shall be valid and binding.

Sub-s. 2. The decision of the Superior Court of Law at Toronto, or any motion made under this section, shall be final, and shall not be subject to appeal to the Court of Appeal.

Sec. 38. In any action in the County Court entered for trial at any sittings of Assize and *Nisi Prius*, the Judge presiding at the sittings shall have the same powers as to amendment of the record, adding and amending pleadings, putting off the trial, reference to arbitration, and making the cause a *remanet*, and otherwise



dealing with the cause and proceedings therein, as if the action had been commenced in a Superior Court of Common Law.

Sec. 39. Whenever the said Judge endorses on the record in any such action the word "*Remanet*," and adds any words to the effect following:—"And the within cause may be entered and tried at any County Court or Assizes," such cause may be entered at any subsequent sittings of the County Court, or of Assize and *Nisi Prius*, without any further entry or suggestion whatever relative thereto, and may be tried and disposed of in the same way as any other case entered at such sittings; and in such case an entry shall be made in the record to the effect of Form 4 in the schedule to this Act, and the *postea* shall then be adapted to the finding of the issues, as they may be tried and determined before a Judge or a jury in the County Court, or at the Sittings of Assize and *Nisi Prius*.

Sec. 40. Wherever any such cause is referred by the persiding Judge at such sittings, the County Court in which the action is brought and the Judge thereof, shall have the same power to enforce any award, report or certificate made on the reference, and to make rules and orders upon appeals therefrom and motions relating thereto, as if the order referring the case had been made by the County Judge.

Sec. 41. The Clerks of the several County Courts shall provide books in which the Judges sitting in the Courts of Assize and *Nisi Prius*, where cases brought in any County Court are tried or assessed under this Act, may enter their notes of such trials and assessments; and such books immediately after such trial or assessments, shall be returned to and remain in the offices of such Clerks.

Sec. 42. On the application of any of the parties, the County Court Clerk shall at the cost of such party, forward to the Clerk of the Crown and Pleas at Toronto, of such of the Superior Courts as such party designates, a certified copy of the Judges' notes of the trial or assessment of any such cases, together with the records and exhibits, to enable such Superior Court properly to dispose of any application, made or to be made, in or respecting such cases.

Sec. 43. The costs in all such proceedings in the said several Courts shall be the usual costs of such cases in the Court in which the action was brought.

Sec. 44. The Jury fees and the fees and charges payable and pertaining to officers of the County Court, upon all actions, suits or proceedings brought in the County Courts, and tried or assessed in the Superior Courts, shall be chargeable and paid as if the same were being tried or assessed in the County Courts; and no other fees shall be chargeable thereon, and the Clerk of the County Court shall be entitled to receive and take such part thereof as pertains to him to his own use.

"*Present practice of the Court of Chancery.*" In Chancery the trial is had before a Judge without a jury, the evidence is taken and the cause is heard at the same time unless the Judge otherwise orders.

As to entry for trial, notice of trial, proceedings at trial, etc., see O. XXXI.

*Legal and equitable issues.*—Where in an action or other proceeding at law both legal and equitable issues are raised, such issues shall be tried at the same time unless the Court, or a Judge thereof, or the Judge presiding at the trial, otherwise directs, R. S. O., c. 50 s. 258.

"*Exclusive jurisdiction.*"—The jurisdiction exercised by the Court of Chancery was divided into the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction, Taylor's Eq. Jur. s. 53. It exercised concurrent jurisdiction with the Courts of Law in most cases of fraud, accident, mistake, account, partition and dower. It claimed exclusive jurisdiction in most matters of trust and confidence, and wherever in the interests of justice the interference of a Court of Judicature was necessary to prevent a wrong, and the positive law was silent, 1 Fonbl. Eq. B. 1, c. 1, s. 3 note (f). The auxiliary jurisdiction was exercised to remove legal impediments to the fair decision of questions depending in Courts of Law; to compel discovery in aid of actions at law; and to perpetuate testimony when in danger of being lost before the matter to which it related could be made the subject of judicial investigation; it was also exercised for the purpose of rendering the judgments of Courts of Law effective, by providing for the safety of property in dispute pending litigation; by restraining the party in whose hands it is from exercising any power over it, or parting with it until further order; by counteracting fraudulent judgments; and by putting a bound to vexatious and oppressive litigation, 1 Fonbl. Eq. B. 1, c. 1, s. 3, note (b).

The classes of cases formerly ranged under the head of exclusive jurisdiction has been much restricted by R. S. O., c. 49, s. 4. See note, *ante*.



46. As often in every year as the due despatch of business and the public convenience may require, there shall be sittings at every county town, for the trial of causes and issues, whether legal or equitable, which are to be heard and determined by a Judge without a jury, and in case such sittings are appointed at any county town for the same time and before the same Judge as jury cases, separate lists shall be made of the jury and non-jury cases, and the jury cases shall first be disposed of, unless where the Judge shall see fit, for some special reason, to direct otherwise. This section is subject to section 255 of the Common Law Procedure Act.

See R. S. O., c. 40, ss. 23-27; c. 41, ss. 1-12; c. 49, s. 3; c. 50, s. 249.

"Judge without a jury."—See notes to sec. 45.

"Separate lists."—Under O. XXXI., s. 14, separate lists are also to be made for defended and undefended issues. By r. 10 of the same Order, where the Judges consider that public convenience so requires, provision may be made for the trial at a separate time, or before another Judge, of the actions from the Chancery Division.

See 255, C. L. P. A.—See notes to sec. 45.

47. Subject to any Rules of Court and to such right as may exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred, by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending, for inquiry and report to a Judge of a County Court, or to an official referee, or to any other person agreed on by the parties; and the report of such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court.

See Imp. Act of 1873, s. 56; R. S. O. c. 50, ss. 189, 195, 197.

There are now various methods in which issues raised in an action may be disposed of.

1. The parties may agree upon some issue or issues of fact which may by an order be sent down to trial, R. S. O. c. 50, s. 181, *et seq.*

2. The whole action may be compulsorily referred to arbitration, R. S. O. c. 50, s. 189, *et seq.*

3. Or it may be referred by consent of parties, R. S. O. c. 50, s. 201, *et seq.*

4. Questions arising in the action (but not the action itself) may be referred to an official referee or other person agreed upon for report, Ont. Jud. Act, s. 47.

5. Questions or issues of fact (but not the action itself) may be sent before an official referee or other person agreed upon, for trial, Ont. Jud. Act, s. 48.

6. Necessary inquiries or accounts may be ordered to be made or taken at any time notwithstanding that there is some special or further relief sought for, O. XXIX., r. 1, and see R. S. O. c. 49, ss. 26-29.

7. The parties may concur in stating questions of law in the form of a special case for the opinion of the Court, O. XXX., r. 1.

8. Or the Court or a Judge may direct a special case to be stated, O. XXX., r. 2.

9. If the writ be specially endorsed, the plaintiff may, after appearance, apply for leave to sign final judgment upon an affidavit verifying the cause of action and stating a belief that there is no defence, O. X., r. 1.

10. Any party at any stage may apply, upon admissions of fact in the pleadings or in the examination of any other party, for such order as he may be entitled to; or where the only evidence consists of documents and such affidavits as are necessary to verify them; or where infants are concerned and evidence is necessary so far only as they are concerned for the purpose of proving facts which are not disputed. O. XXXVI., r. 8.

11. Any application before the Court may be turned into a motion for judgment, O. XXXVI., r. 9.

12. At any time after service of the writ an *ex parte* application may be made for leave forthwith to serve notice of motion for judgment. If leave be given the Court may on return of the notice either grant or refuse the motion or give directions for the examination of either parties or witnesses or the making of further inquiries, O. XXXVI., r. 10.

13. Cases formerly within the jurisdiction of the Courts of Law, if they escape premature extinction under one of the foregoing provisions, are to be tried as formerly they would have been, Ont. Jud. Act, s. 45.

14. Cases formerly within the exclusive jurisdiction of the Court of Chancery are to be tried according to the Chancery practice.—*Ibid.*

"Any question."—The reference under this section is not of the action, but of some question arising in the action. The form of the order is, "That the following question arising in this action, namely \_\_\_\_\_ be referred for inquiry and report to \_\_\_\_\_, under section 47 of the Judicature Act, and that the costs of this application be \_\_\_\_\_," see Form No. 130. The effect of this and the following section appears clearly in the judgments given in *Longman v. East*; *Pontifex v. Severn*; *Mellin v. Monico*, L. R. 3 C. P. D. 142. As the matter is important some extracts from the judgments (the section numbers altered so as to be applicable to Ontario practice) are given. Brett, L. J., said:—"I think it convenient before I proceed to the construction of the Judicature Acts, to consider the kinds of references that existed previously to the passing of those Statutes, and afterwards to consider the effect of the Judicature Acts on the then existing law. Before the Judicature Acts there were several modes in which disputes were remitted to the decision of third persons, and which might be called references. There was the Common Law reference to an arbitrator constituted by the consent of parties, there was the compulsory reference to an arbitrator under the provisions of the Common Law Procedure Act, and in the Court of Chancery there was the reference into Chambers. It was not intended by the Judicature Acts to interfere with these references, and they at present exist with all their incidents. But it was thought that further powers ought to be given to the Divisional courts, and I think that sec. 47 gives to the Chancery Division a new tribunal; that is to say, instead of referring certain questions for a report into Chambers, that Court may, if they think fit, refer questions to an official referee—an officer newly appointed with limited duties and also defined powers. Sec. 47, therefore, gives to that Division a new tribunal, in addition to their own Chambers, but it gives to the Common Law Divisions a new power as well as a new tribunal; it gives them power to do what the Court of Chancery had done in a suit or cause. The Common Law Courts had no power previous to the passing of sec. 47 to refer matters in a cause for report. This section, however gives them power to remit questions in a cause for report in the same way as a question was referred in the Court of Chancery into Chambers, and afterwards the report was brought back from Chambers to the Court. Sec. 48 gives powers both to the Chancery Division and to the Common Law Divisions which neither of them possessed before. It gives power to either Division to send certain questions or issues in causes to an official referee, or to a special referee, to be agreed on between the parties, not for report but for trial. That section gives powers to the Courts under two different sets of circumstances. In the one case it gives them power to remit more questions to the official referee than it does in the other. It deals with references to the official referee by consent of the parties and by compulsion. In the sentence 'which cannot, in the opinion of the Court or Judge, conveniently be made before a jury, or conducted by the Court or Judge directly,' the former words apply

evidently to the Common Law Divisions, where cases are tried by jury, and the latter to the Chancery Division. I think, therefore, that where the parties have consented, the Court may send, not the whole cause, but any question or issue of fact in the cause to an official referee to try. Where an order is made without consent, they can only send such questions as are brought within the terms of the section, that is, any issue requiring a prolonged examination of documents, or requiring the examination of accounts, or requiring any scientific or local investigation. But then it is not every question that requires scientific or local investigation, or an examination of documents or accounts which can be referred to the official referee. The governing words of the section are, 'which cannot, in the opinion of the Court or a Judge,'—it must be a judicial opinion—'conveniently be made before a jury or conducted by the Court or a Judge directly.' If any part of a cause is brought within these terms, then the Court or a Judge may by compulsion, at any time before or at the trial, order those questions or those issues, which are thus brought within the definition, to be tried by an official referee. In the first case, where the reference is by consent of the parties, I think that all issues of fact may be sent before an official referee, but that questions of law cannot be sent to him even by consent of the parties, they have no right to impose upon the official referee such a reference, but if the parties agree, then it seems to me that all the issues of fact in a case may be sent to the official referee to try. If by consent all the questions of fact in a cause are sent to an official referee, and if there are no issues of law to be afterwards decided by the Court, then I incline to think that the parties may relieve the official from reporting or finding expressly as to each question of fact, and that they may consent to his reporting to the Court the general effect of his finding of all the facts in the form, that, having tried all the issues of fact, he found the result to be in favour of the plaintiff or the defendant. But I think that the referee has no jurisdiction to order judgment to be entered; that must be the act of the Court. If the parties consent that the referee shall try all the issues of fact, and further, consent that he shall report generally, I think even in such a case there is an appeal from him under s. 49, on which I will presently express my opinion. If the reference to the official referee, under s. 48, is without consent, I think that he is only to try the issues which may be sent to him; not to report the evidence upon which he found each issue, but to state the result of each issue, and then the Court will have to give judgment as they think right upon the findings, it being possible that there may be several other issues in the same cause to be tried in another manner. Then the whole result must afterwards be brought before the Court, and the Court must give a decree or a judgment accordingly, as is done in the Chancery Division. There is, I think, an appeal from the findings of the official referee on such issues."

Bramwell, L. J., said :—"Under sec. 47, any question arising in the cause may be referred by the Court or Judge for inquiry and report to an official or special referee. He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties; if there are facts disputed—for instance, if one of the parties asserts that a building is twenty feet high, and the other that it is twenty-five feet—the referee, in such a case as that, must determine the fact and report it; his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act. Clearly, under sec. 47, an action cannot be referred to him to decide facts and law. In like way, under sec. 48, all that can be done is, in a case where there is no consent, the Judge can refer issues of such a character as are mentioned, that is to say, when they require any prolonged examination of documents or accounts, scientific or local investigation, which could not conveniently be made before a jury, then the Judge may, without consent, order any issue of fact involving any such matters to be tried by an official referee. Where there is a consent, his power is still confined, that is, he has no jurisdiction to order the action to be determined, but he may order any question or issue of fact to be tried; therefore, the order would not be limited to such cases as before described, but would include any question or issue of fact, or any question of account arising therein. But there is no power to refer the action, only questions or issues of fact; and where there is no consent, it is only issues of fact of the particular character enumerated that can be referred, unless possibly some other issue of fact was so mixed up with them that it could not practically be severed. Although the words are, 'on such terms as may be thought proper,' that does not authorize the Judge to refer a different matter, or to refer that which he otherwise could not have referred, but it means he may do it on such terms as may be thought proper with a view to the decision of what he may refer, and with a view to who shall bear the costs afterwards."

*An invalid order may be good as a reference to arbitration.*—In *Mellin v. Monico* (one of the above cases), an order had been made at the instance of the plaintiff that the action should be referred for trial to one of the official referees. This order was held to be in excess of the jurisdiction of the Court under the sections in question, but was nevertheless, under the circumstances of the case, upheld, Brett, L. J., saying:—"With regard to *Mellin v. Monico*, I think that the order in that case as drawn up is inconsistent with the powers to refer contained in the Act of 1873, and is therefore a bad order; but the plaintiff having consented to the order in that form, and acted upon it up to the end, and taken his chance of a decision in his favour, we must hold that he accepted it, not as a reference under the Judicature Act, but as a reference to the official referee which he consented to take, not as official referee, but as an arbitrator at common law. If that were not so, then I should say there would be an appeal; but then that would have been such an appeal as I have described, that is to say, Mr. Castle might, if he had had materials, have moved as for a misdirection, or a decision against evidence."

*If one issue proper for reference, all the issues can be referred.*—In *Longman v. East*, L. R. 3 C. P. D. 142, Brett, L. J., said:—"It was contended that sec. 48 was to be construed as s. 3 of the Common Law Procedure Act, 1854, had been construed, that is to say, where a part of a cause was considered by the Judge a matter of account which could not be conveniently tried in Court, the Judge under the Common Law Procedure Act, 1854, referred the whole cause. But in my opinion that is not the construction of s. 48. I do not think because one issue in the cause is brought within the terms of section 48, the Court, or Judge, have power to order all the issues in the cause to be sent to the official referee unless those other issues are so mixed up with that issue that, although they are different issues in form, yet in substance there is really only one issue." Cotton, L. J., said:—"My own opinion is that the issues, which without consent may be sent to a referee, cannot be restricted to those issues which involve local or scientific examination or matters of account. There may be certain issues so connected with the matters of account, or with the matters requiring local inquiry or scientific examination, that it would be hardly possible fairly to deal with the issues, not of that special character, without sending them to the same person who is to deal with those requiring scientific examination or local investigation, or matters of account. But, in my opinion, it would be wrong even if there is any jurisdiction, which I do not say there is, to transfer all the issues in a cause to a referee simply because there is a matter of account which can only be properly dealt with by him." See also *Ward v. Pilley*, L. R. 5 Q. B. D. 427; 49 L. J. N. S. (C. L.) 705, in which it is broadly laid down that in any case in which the Court has jurisdiction to refer compulsorily a question of account to an official referee it has also jurisdiction so to refer all the other issues in the action.

*Questions of fraud.*—A Judge has jurisdiction to refer compulsorily issues which involve questions of fraud, affecting the character and reputation of the parties, though, as a general rule, such issues ought not to be referred, *Hooch v. Boor*, 49 L. J. N. S. (C. L.) 665.

An executrix brought an action to set aside for fraud the sale by the defendant to her testator of about 130 pictures for prices amounting in the whole to £50,000. The defence denied the fraud. The plaintiff moved to have the question referred to a special referee, under the Judicature Act, sec. 47, on the ground that the examination of the pictures required a scientific investigation, which could not conveniently be had before a jury. The defendant opposed, and stated his wish for a trial by a jury:—Held (affirming the decision of Hall, V. C.) that the case was not within the purview of sec. 47 so as to give jurisdiction without the consent of all parties to send it to a referee, and that if there had been jurisdiction still, as the case involved questions of fraud seriously affecting the character and fortune of the defendant, it ought not against his will to be tried otherwise than in open Court. James, L. J., said:—"Even if there were jurisdiction to make the order asked, which I think there is not, this case is one in which the defendant ought not to be compelled to go before a referee. If a man says, 'My character is at stake, and I insist upon having the case tried in open Court,' I should be shocked to find that any course of proceeding in this Court interfered with his right to have it so tried." *Leigh v. Brooks*, L. R. 5 Ch. D. 592.

*"Questions of Account."* These words will receive a large construction. A claim made in an administration suit by a dealer in works of art against the estate of the testator for £19,000, the aggregate prices of twenty-four items, consisting of pictures and articles of vertu supplied to the testator in his lifetime, and specified

in an account delivered to his executor, was, on the application of the executor ordered to be tried before the official referee. In *re Leigh, deceased*; *Rowcliffe v. Leigh*, L. R. 3 Ch. D. 292.

Lush, J., at Chambers, refused to order a compulsory reference to a special referee of an action brought by trustees against their solicitors for negligence in making a favourable report on a property which produced no rent, the report having misled them into investing the trust moneys on a mortgage of the property. 1 Charley's cases (Chambers) 26.

A compulsory reference may be ordered by a Judge at Chambers, under this section, where the furniture of a house has to be examined, that being a "local investigation." 1 Charley's cases (Chambers) 29.

An order was made by Mr. Justice Quain at Chambers, for a compulsory reference of the plaintiff's claim in an action by a builder for work and materials and the defendant's counter-claim for damages for non-completion to a special referee to be agreed upon by the parties, *Id.*

An order was made by Mr. Justice Quain at Chambers, for a compulsory reference of an action to recover £300 for the erection of a skating rink to a special referee to be agreed upon by the parties, and, in event of their failing to agree, to a Master. In this case the applicant, the defendant in the action, put in an affidavit that the surveyor refused to give his certificate, and that "a local if not a scientific investigation was necessary," *Id.*, 28.

*Appeal from referees under Secs. 47 and 48.* In *Longman v. East*, L. R. 3 C. P. D. 142, Brett, L. J., said:—"The next question is, what is the nature of the appeal which is given? That will be found at the end of s. 49; the words are, 'and the report of any referee on any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.' I should say that, in the case of a report to the Court or Judge under s. 47, the Court or Judge may differ from the official referee as to any finding which is an inference from the facts that the referee has reported; they may deal with his report generally in the same way as the Courts do with a report of the Master upon a matter of discipline. But with regard to the finding of a referee of issues of fact sent to him under s. 48, either by consent of the parties or without consent, I think the appeal is of the same nature as the appeal from the finding of a Judge when he tries without a jury, or as the appeal from the finding of a jury: that is to say, the Court must accept the finding of the referee, unless they can set it aside, according to the ordinary rules which would be applicable to the finding of a jury, or to the finding of a Judge trying a cause without a jury. It is open to appeal, therefore, whether improper evidence has been received by the official referee, or whether the official referee, in considering the facts, has, so to speak, misdirected himself. The Court can set aside the finding of the official referee, if they consider that the finding is a finding against the evidence, in the same way that the Court set aside the finding of a jury when their finding is against the evidence. In that case if the issue were a material one, the Court would have to send back that issue to the referee, or to some other referee to be tried."

*Forms.*—The form of order under sec. 47 is given above (and see Form No. 130). The order under sec. 48 is not for a reference to inquire and report, but that the "the following question (or issue) of fact (or account) viz., arising in this action be tried before pursuant to sec. 48 of the Ont. Jud. Act." For further usual terms of the order, see Chitty's Forms (11 ed.) 787; but see also O. XXIX., rr. 2, 4.

*Procedure.*—If an order referring certain issues to an official referee be made at the trial the proper course is to direct the reference, and order the trial to stand over and not to give judgment, direct the reference under the judgment, and reserve further consideration, *Sykes v. Brook*, 15 L. J. (notes of cases) 138.

After the trial the referee makes a report, in which he should give his finding upon each issue, and, where the case is one in which the Court will require information, should report upon the facts and any principle of calculation, *Mayor of Birmingham v. Allen*, W. N. (1877) 190; but mere evidence should not be set out, *Longman v. East*, L. R. 3 C. P. D., at p. 155; *Quare*, whether a referee should give his reasons for his findings, *Dunkirk Colliery Co. v. Lever*, L. R. 9 Ch. D. 20.

*Motions respecting Report.*—Under sec. 47 the report has to be "adopted wholly or partially by the Court," and if adopted may be enforced as a judgment. The report under sec. 48 is (unless set aside by the Court) "equivalent to the verdict



of a jury," see sec. 49. In proceeding under sec. 47 the motion is an order adopting the report, but see *post*. Upon this motion the parties are entitled to the opinion of the Court upon the report, and any objections to it should be notified to the opposite party, *Wood v. Barnicot*, W. N. (1878) 25. The Court may differ from the referee as to any finding which is an inference from the facts that he has reported, *Longman v. East*, L. R. 3 C. P. D., at p. 155. But the Court cannot alter or vary the report. The Court may adopt it wholly or partially or entirely disregard it, and may in such latter case either refer the issues back again for further report, or put the action in some other course of trial. The Court has no power to form its own conclusion from the evidence adduced before the referee, *Dunkirk Colliery Co. v. Lever*, L. R. 9 Ch. D. 20. It is said in *Hayne's Chy. Prac.* p. 530, "that it will not always be necessary to give this notice of motion, if the reference has been directed at the trial of the action, and further consideration was reserved, the proper course will be to set down the action for hearing on further consideration. Where a motion is necessary it would seem to be a motion for judgment." The procedure under sec. 48 is different. In that case the motion by way of appeal "is of the same nature as the appeal from a Judge when he tries without a jury, or as the appeal from the finding of a jury; that is to say the Court must accept the finding of the referee unless it can set it aside according to the ordinary rules which would be applicable to the finding of a jury, or to the finding of a Judge trying a cause without a jury," per Brett, L. J., in *Longman v. East*, L. R. 3 C. P. D. at p. 155.

*Judgment after trial of issues under Sec. 48.*—The order of reference may direct the entry of judgment after the issues have been tried. In such case the form of judgment given in the forms subjoined to the Rules No. 159 is the proper one for use. In case there has been no such direction, then O. XXXVI., rr. 4-5 prescribe the subsequent procedure. These Rules are as follows:—

R. 4. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and there is no direction of a Court or Judge for the entry of judgment, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within 10 days after his right so to do has arisen, then after the expiration of such 10 days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

R. 5. Where issues have been ordered to be tried, or issues or questions of fact to be determined, in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

Upon the motion an order is obtained and thereupon judgment is entered in the Form No. 167.

*Discovery after Order of Reference.*—In actions which have been referred under the 47th section of the Judicature Act, orders for the production of documents may be made by the Judge who has directed the reference, in *re Leigh*; *Rowcliffe v. Leigh*, L. R. 4 Ch. D. 661. *Quare*, Whether such an order can also be made by the referee, *ib.*

"*Court, Divisional Court or Judge.*"—In the form of the order to be made under this section (No. 130) the "name of the Judge or Master in Chambers" making the order is directed to be filled in; see, however, notes to O. IV. r. 1 (a).

"*Official referee.*"—The official referees are the Judges of the County Courts, the Master in Chancery, the Clerks of the Crown and Pleas, the Referee in Chambers, the Accountant, the Inspector of Titles, the Referee of Titles, and the Local Masters of the Court of Chancery; see secs. 62 and 63 and notes.

*Arbitration.*—As to compulsory and voluntary references of the matters in dispute to arbitration and procedure thereon, see R. S. O. c. 50, ss. 189-227; O. XXIX.

For form of order of reference, see Forms, No. 127.

The old law and practice with reference to arbitration are not abolished by the Judicature Act, and consequently, when a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the Court with regard to the matter referred to him, but his decision is final, *Cruikshank v. The Floating Swimming Baths Co.*, L. R. 1 C. P. D. 260.

*Sitting aside award.*—An action having been referred to arbitration, the award was published on the 14th of July. On the 24th of November (being the last day but one of the old Michaelmas Term) the defendants moved the Court to set aside the award, but the Court refused the application on the ground that notice of motion had not been given to the plaintiff. The defendants, afterwards, on the same day, served on the plaintiff a notice that on the 27th of November they would move the Court to set aside the award:—Held, on the authority of *In re Corporation of Huddersfield and Jacomb*, L. R. 17 Eq. 476; 10 Ch. 92, that the service of notice of motion on the 24th of November was a complaint made in the Court before the last day of the next term after the publication of the award within 9 and 10 Wm. III. c. 15, s. 2, although no affidavit was filed before the last day, as had been done in that case: *Smith v. Parkside Mining Company*, L. R. 6, Ex. D.

- (2) The High Court, or any Divisional Court or Judge as aforesaid, or the Court of Appeal, may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such referees or assessors shall be determined by the Court.

See Imp. Act of 1873, s. 56, second part.

As to the effect of the corresponding G. O. Chy. No. 541, in extending the jurisdiction of the Court of Equity, see *McIntosh v. G. W. R. Co.*, 3 Sm. & G. 146; *Mildmay v. Methuen*, 1 Drew. 216, 16 Jur. 965. As to the employment of accountants, *Re London, Birmingham and Bucks Ry. Co.*, 6 W. R. 141; and, they need not always be employed in the presence of the parties, *Id.*

48. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court, (1) in which all parties interested who are under no disability consent thereto, and also (2) without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge conveniently be made before a jury, or conducted by the Court or Judge directly,—the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact, or any question of account arising in the cause or matter, to be tried either before a Judge of a County Court, or before an official referee, or (if the parties so agree) before a special referee.

See Imp. Act of 1873, s. 57, first part. See notes to preceding section.

For form of order of reference under this section, see Forms, No. 131.

For form of judgment after reference under this section, see Forms, No. 159.



- (2) All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct.

See Imp. Act of 1873, s. 57, second part.

As to mode of conducting trial, see O. XXXI, rr. 23-28.

**49.** In all cases of a reference to or trial by referees under this Act, the referees shall be deemed to be officers of the Court, and shall have such authority for the purpose of the reference or trial as shall be prescribed by Rules of Court, or (subject to such Rules) by the Court or Judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury.

See Imp. Act of 1873, s. 58.

"*Officers of the Court*," as to their powers, see O. XXXI, rr. 23-28.

"*Court or Judge*," see notes to O. IV., r. 1 (a).

"*Equivalent to the verdict of a jury*," see notes to Sec. 47.

"*Unless set aside by the Court*," upon a motion to set aside or vary the judgment in a case tried before an official referee under this section, an affidavit or some evidence of what took place at the trial must be furnished to the Court, *Stubbs v. Boyle*, L. R. 2 Q. B. D. 124.

**50.** With respect to all such proceedings before referees and to their reports, the Court or Judge shall have, in addition to any other powers, the same or the like powers as by the Common Law Procedure Act and other Acts are given to any Court whose jurisdiction is hereby vested in the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards and appeals therefrom respectively.

See Imp. Act of 1873, s. 59.

"*References to Arbitration*."—See R. S. O., c. 50, ss. 189-227, and all the Ontario authorities, collected in Robinson & Joseph's Digest.

**51.** In the office of every Deputy Registrar and Deputy Clerk of the Crown such seal shall be used as the Lieutenant-Governor shall from time to time direct, which seal shall be impressed on every writ and other document issued out of or filed in such office; and all such writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such Deputy Registrar or Deputy Clerk of the Crown, shall in all parts of this Province be received in evidence without further proof thereof.

See Imp. Act of 1873, s. 61: R. S. O., c. 40, s. 3; c. 47, s. 6.

**52.** Save as by this Act or by any Rules of Court may be otherwise provided, all forms and methods (as nearly as may be) of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by this Act vested in the said High Court under or by virtue of any law, general order, or rule whatsoever, and which are not inconsistent with this Act or with any Rules of Court—may continue to be used and practised, in the said High Court of Justice, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so vested, if this Act had not passed.

See Imp. Act of 1873, s. 73, as amended by Imp. Act of 1875, s. 21.

See notes to section 12 *ante*.

# RULES OF COURT.

**53.** The Rules of Court in the Schedule to this Act shall come into operation at the commencement of this Act and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice. But such Rules of Court and also all such other Rules of Court (if any) as may be made after the passing and before the commencement of this Act, under the authority of the next section, may be annulled or altered by the authority by which new Rules of Court may be made after the commencement of this Act.

See Imp. Act of 1875, s. 16.

"Commencement of this Act." See sec. 2 and notes.

**54.** At any time after the passing and before the commencement of this Act, the Chief Justice of Ontario, the Justices of Appeal, the Chief Justice of the Queen's Bench, the Chancellor, and the Chief Justice of the Common Pleas, or any five of them, and the other Judges of the several Courts intended to be united and consolidated by this Act, or a majority of such other Judges, may make any further or additional Rules of Court for carrying this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the Rules in the Schedule to this Act; that is to say:—

- (a) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers;

- (b) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal;
- (c) For the hearing of appeals from County Courts, or a Judge of a County Court, from Surrogate Courts, Stipendiary Magistrates, or Division Courts, by any two or more of the Judges of the Supreme Court, instead of the same being heard by the Court of Appeal, or a Judge thereof, (as the case may be); and for regulating the selection of the Judges of the Supreme Court, who shall hear such appeals, and for regulating all matters relating to the practice on such appeals;

See R. S. O., c. 38, s. 19; 41 Vic. c. 8, s. 3; 42 Vic., c. 19, ss. 16, 17; 43 Vic., c. 8, s. 21.

- (d) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the said Supreme Court, or to the costs of proceedings therein; and every other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts now or hereafter in force respecting the said Courts.

See Imp. Act of 1875, s. 17; R. S. O., c. 49, s. 45, sub-s. 7.

- (2) The said Judges shall have power, subject to the approval of the Lieutenant-Governor in Council, to make rules from time to time regulating all fees payable in stamps.
- (3) From and after the commencement of this Act, the said Supreme Court may at any time, with the concurrence of a majority of the Judges thereof present at any meeting for that purpose held, alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making Rules of Court as is by this section vested in the existing Judges before the commencement of this Act.
- (4) All Rules of Court made in pursuance of this section, if made before the commencement of this

Act, shall from and after the commencement of this Act, and if made after the commencement of this Act shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section.

See Imp. Act of 1875, s. 17.

- (5) Subject to any Rules of Court which may be made under the preceding provisions of this section the Judges of the Court of Appeal shall continue after the commencement of this Act to have all the powers which they now possess as to making Rules of Court for the regulation of the practice in appeals; and the Judges of the High Court shall as regards matters in the said High Court have in like manner all the powers which the Judges of the Court of Chancery and of the Superior Courts of Law have respectively for the regulation of the practice of the said Courts.

See R. S. O., c. 38, s. 56; c. 49, s. 45.

- (6) Where any provisions in respect of the practice or procedure of any Courts, the jurisdiction of which is vested by this Act in the High Court of Justice, are contained in any Statute, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice, unless, in the case of any Act hereafter passed, this power shall be expressly excluded with respect to such Act or any provision thereof.

See Imp. Act of 1875, s. 24.

- (7) Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

See Imp. Act of 1875, s. 24.

**55.** The Lieutenant-Governor in Council may from time to time authorize the following persons, viz.: the Chief Justice of Ontario, the Chief Justice of the Queen's Bench, the Chancellor, and the Chief Justice of the Common Pleas, to make Rules of Court under this Act; every such appointment to continue for

such time as shall be specified by Order in Council, and the Judges so appointed, or any three of them, may make such Rules, and the same shall have the same effect as if made by all the Judges of the Supreme Court, under the preceding section.

See Imp. Act of 1876, s. 17, latter part.

**56.** A Council of the Judges of the said Supreme Court of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Lieutenant-Governor, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the said High Court of Justice or the said Court of Appeal, or any other Court or by any other authority; and they shall report annually to the Lieutenant-Governor what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provision (if any) which cannot be carried into effect without legislative authority it would be expedient to make for the better administration of justice. An Extraordinary Council of the said Judges may also at any time be convened by the Lieutenant-Governor.

See Imp. Act of 1873, s. 75.

**57.** All statutes relating to the several Courts consolidated by this Act, and the Judges thereof, or wherein any of such Courts or Judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the said High Court of Justice, and the Judges thereof, as the case may be, had been named therein instead of such Courts, so consolidated as aforesaid, or the Judges thereof; and in all cases not hereby expressly provided for in which, under any such Statute, the concurrence or the advice or consent of the Judge or any Judges, or of any number of the Judges, of any one or more of the Courts so consolidated is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of Judges of the said High Court of Justice; and any

general or other commission, by virtue whereof any Judges of any of the Courts so consolidated may, at the commencement of this Act, be empowered to try, hear, or determine any causes or matters civil or criminal, shall remain and be in full force and effect, unless and until they shall respectively be in due course of law revoked or altered.

See Imp. Act of 1873, s. 76.

---

## PART V.

### OFFICERS AND OFFICES.

58. Subject to orders of the Lieutenant-Governor in Council, all officers, save as hereinafter mentioned, who at the time of the commencement of this Act shall be attached to the Court of Chancery shall be attached to the Chancery Division of the said High Court; and all officers who at the time of the commencement of this Act shall be attached to the Court of Queen's Bench shall be attached to the Queen's Bench Division of the said High Court; and all officers who at the time of the commencement of this Act shall be attached to the Court of Common Pleas shall be attached to the Common Pleas Division of the said High Court.

See R. Sup. C., O. 60, r. 1.

- (2) Subject as aforesaid, the above provision shall not apply to the Master in Ordinary or local masters of the Court of Chancery, or to the taxing officers, and all these officers shall be officers of the Supreme Court and attached thereto.
- (3) All officers shall hold their offices by the same tenure, and upon the same conditions as to security and otherwise, as if this Act had not passed.

See Imp. Act of 1879, s. 23.

- (4) Where a doubt exists as to the position under this Act of any existing officer attached to any Court or Judge affected by this Act, such doubt may be determined by Rule of Court. The Lieutenant-Governor in Council shall have the power, and (subject to any Order in Council) the Judges of the said Supreme Court

shall have power, to change the official names of offices and officers, and to change and regulate the duties of the officers.

See Imp. Act of 1879, s. 24.

- (5) Any officer who is removable by the Court to which he is now attached shall be removable by the Court to which he shall be attached under this Act, or by the majority of the Judges thereof.

See Imp. Act of 1873, s. 77; R. S. O., c. 40, s. 11.

**59.** Subject to any Order in Council in that behalf, the business to be performed in the High Court of Justice and in the Court of Appeal respectively, or in any Divisional or other Court thereof, or in the chambers of any Judge thereof, other than that performed by the Judges, shall be distributed among the several officers attached to the said Courts by section 58 in such manner as may be directed by Rules of Court; and such officers shall perform such duties in relation to such business as may be directed by Rules of Court; and, subject to such Order in Council and Rules of Court, all such officers respectively shall continue to perform the same duties, as nearly as may be, and in the same manner as if this Act had not passed.

See Imp. Act of 1873, s. 77, fourth paragraph.

**60.** All bonds, and securities heretofore given by Government officers and their sureties or by other persons, shall be held to be and continue binding, notwithstanding the changes effected by this Act, except in the case of any surety who, at least one calendar month before this Act goes into effect, gives notice in writing to the Provincial Secretary of his wish to be relieved of his liability.

See 32 Vic., c. 29, s. 17; 40 Vic., c. 6, s. 9 (D); "*before this Act goes into effect.*"  
See sec. 2.

**61.** Every officer of the Court hereafter appointed before he enters upon his duties shall take and subscribe the following oath: "I, A. B. of—, do hereby solemnly swear that I will, according to the best of my skill, learning, ability and judgment, well and faithfully execute and fulfil the duties of the office of (*as the case may be*) without favour or affection, prejudice or partiality, to any person or persons whomsoever: So help me God."

See R. S. O., c. 40, s. 12.



- (2) When not convenient to a person appointed to any office to attend at Toronto to take the oath of office, the oath may be taken before the Judge of the County Court of the County in which such officer resides, or before any Commissioner authorized to administer affidavits in such County, and the oath shall be certified by such Judge or Commissioner and filed amongst the records of the Court at Toronto. In all other cases the oath shall be administered to the officer by the Judges or one or more of them in open court.

See R. S. O., c. 40, ss. 13, 14.

62. Subject to any Rules of Court, the Master in Chancery, the Clerks of the Crown and Pleas, the Referee in Chambers, the Accountant, the Inspector of Titles, the Referee of Titles, the Local Masters of the Court of Chancery, and any other officers of the Superior Courts of Law and Equity, shall respectively have (under the said names or any names which by or under this Act are or shall be given to them or any of them) the same judicial and other powers in respect of business in each and every of the Divisions of the said High Court as they have now in respect of the business of the Court to which they are attached; and the orders and decisions of the said officers shall be subject to appeal as heretofore.

See R. S. O., c. 39, ss. 29-32; c. 40, ss. 8, 9, 10, 28, 29, c. 50 s. 189, *et seq.*; c. 110, s. 23; Reg. Gen. of Feb., 1870, (29 U. C. R. 623); G. O. Chy. Nos. 14, 15, 34-38, 197, 211-254, 495, 531, 534, 560, 589, 625, 626, 633, 634, 636, 638, *et seq.*

"*Clerks of the Crown and Pleas, the Referee in Chambers.*"—Under the former practice the Clerk of the Crown and Pleas of the Court of Queen's Bench and the Referee exercised large judicial powers in Chambers. By O. XLIX, r. 6, it is provided that there is to be a Master in Chambers who is to have the power, authority and jurisdiction heretofore in like cases possessed in the Superior Courts respectively by the Clerk of the Crown and Pleas, of the Court of Queen's Bench and by the Referee in Chambers of the Court of Chancery. This order gives "the power, authority and jurisdiction," not merely the *like* power, etc. It is probable that the words "subject to any rules of Court," in the above section of the Act, are sufficient to prevent any conflict, and taken in connection with the rule quoted, to shew the intention to supersede the two former officers, so far as their Chamber duties are concerned, by the Master in Chambers.

"*Appeal as heretofore.*" *From Masters' in Chancery.* See G. O. Chy., No. 642 *post.* *From the Clerk of the Crown and Pleas of the Court of Queen's Bench.* Reg. Gen. of Hilary Term, 1870, (29 U. C. R. 624) provides as follows:—"That appeals from the Clerk's order or decision shall be made by summons, such summons to be taken out within four days after the decision complained of, or such further time as may be allowed by a Judge or the said Clerk; the appeal to be no stay, unless so ordered by a Judge or the said Clerk. The costs of such appeal shall be in the discretion of the Judge.

*From the Referee in Chambers.*—Appeals from the Referee in Chambers have been made to the presiding Judge in Chambers on Mondays, two clear days' notice of motion having been given, and the appeal set down not later than the preceding Saturday, G. O. Chy. 591. The appeals had to be made within 14 days, G. O. Chy. 586.

By O. XLIX., r. 13, provision is made for appeals from the Master in Chambers in whom is vested (by O. XLIX., r. 6) the former jurisdiction of the Clerk of the Crown and Pleas of the Court of Queen's Bench, and the Referee in Chambers. It is presumed that the practice there prescribed will supersede the former practice.

*"From the Accountant."*—There has been no such officer as the Accountant since 26th June, 1876. By G. O. Chy. 625, from and after that date the duties formerly discharged by the Accountant were imposed upon the Referee in Chambers, and by G. O. Chy. 626 the words "Referee in Chambers" were substituted for "Accountant" wherever it occurred in the General Orders.

By O. LVI., r. 5, the Registrar of the Court of Chancery is to act as Accountant of the Supreme Court, until and unless some other person is appointed to that office.

*"From the Inspector of Titles, the Referee of Titles."*—See the Quieting Titles Act, 29 Vic., c. 25, and G. O. Chy. 492 *et seq.*

**63.** Subject as aforesaid, the Judges of the County Courts and the officers specially named in the last preceding section, shall be official referees for the trial of such questions as shall be directed to be tried by such referees.

See Imp. Act of 1873, ss. 57, 83; R. Sup C., June, 1876, rr. 14-16; R. S. O., c. 50, s. 189.

*"To be tried by such referees."*—See secs. 47, 48.

- (2) In case the business is found to require other or additional official referees, and the Presidents of the said Divisions so certify, the Lieutenant-Governor from time to time may appoint other and additional official referees accordingly.

See Imp. Act of 1873, s. 83.

- (3) In the case of officers who are paid by salary, the fees on any reference or trial shall be paid in stamps; other referees shall be paid by fees.

**64.** There shall be a Local Master in every County or Union of Counties other than the County of York, and every Local Master hereafter appointed shall reside in the county to which he is appointed.

- (2) Where there is no Local Master at the commencement of this Act, or when a vacancy occurs in the office of Local Master, the Judge of the County Court for the County shall be the Local Master until and unless another person is appointed Local Master. In such case if there are two County Judges—a Senior and Junior Judge—both Judges shall be Local Masters until and unless one of them or some other person is appointed sole Local Master.

- (3) Where a County Court Judge is the Local Master, the County Court Clerk shall be the Deputy Registrar.
- (4) The offices of Deputy Clerk of the Crown and Deputy Registrar (not Local Master) shall be consolidated as vacancies occur in either; unless where the Presidents of the Divisions of the High Court or a majority recommend otherwise.

Although the offices of Deputy Registrar and Local Master have heretofore been united in one person their duties have been distinct. The duties of the Deputy Registrar being similar to those of the Clerk of Records and Writs in Toronto, and the Local Master having within their respective counties all the jurisdiction of the Master-in-Ordinary with certain additional powers, G. O. Chy. Nos. 34-37.

- (5) Where a reference is made to a Deputy Clerk of the Crown, or an examination is taken by him, he shall be entitled to take and receive to his own use the fees on such reference or examination.

See R. S. O., c. 50, s. 189 *et seq.*

- (6) The Lieutenant-Governor in Council may commute the fees of a Local Master, or of a Local Master and Deputy Registrar, including his fees as an official referee, for a fixed annual sum, such sum not to exceed the average income derived from fees for the preceding five years.
- (7) The Lieutenant-Governor in Council may commute the fees payable to a Deputy Clerk of the Crown on references and examinations and other matters for a fixed annual sum, such sum not to exceed the average income derived from such fees during the preceding five years.
- (8) Any annual sum so fixed as provided in the preceding two sub-sections shall continue until varied by Order in Council, but any order for payment of any such annual sum as aforesaid may be rescinded, and the amount of such sum may by Order in Council be increased or diminished, provided that in no case shall any Order in Council name a sum exceeding the average income or fees aforesaid (as the case may be) during the preceding five years.
- (9) The local masters, deputy registrars, and local clerks, shall hereafter, like other officers, be appointed by the Lieutenant-Governor, and shall hold office during the pleasure of the Lieutenant-Governor.

- (10) Where a Local Master, or Deputy Registrar, or Deputy Clerk of the Crown, or other officer, is paid by a salary, he shall not, save as hereinbefore expressly provided, take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled; but the like sums and fees heretofore payable on proceedings in his office shall continue to be payable; and all such fees shall form part of the Consolidated Revenue Fund of this Province, and shall be payable in stamps, subject to the provisions of the Act respecting Law Stamps.

See R. S. O., c. 40, s. 16.

- (11) No Local Master whose gross income from his office of Local Master or of Deputy Registrar and Local Master, is \$2,000 or upwards shall, during the continuance of his appointment, directly or indirectly, practise in the profession of the law as Counsel, Attorney, or Solicitor, or as a Notary Public, or Conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, under the penalty of forfeiture of office, and the further penalty of \$400, to be recovered by any person who sues for the same by action in the High Court, and one-half of such pecuniary penalty shall belong to the party suing, and the other half to Her Majesty for the use of the Province; but nothing in this section shall prevent the Lieutenant-Governor in Council, or the High Court, from requiring a Local Master whose income does not amount to \$2,000, to abstain from practising under the like penalties.

See R. S. O., c. 42, s. 5.

- (12) The High Court may, with the concurrence of the Lieutenant-Governor, relieve any person now holding the office of Local Master and Deputy Registrar, or any other officer from the operation of the preceding first and eleventh sub-sections or either of them.
- (13) Every stamp affixed to any matter or proceeding under the authority of the Revised Statute respecting Law Stamps, shall be cancelled in such manner as the Lieutenant-Governor in Council may direct; and in case the Lieutenant-Governor thinks fit to dispense therewith, it shall not be necessary for the officer who

cancels the stamps to mark thereon, in ink, the date of the issue or receipt of the matter, or proceeding to which the stamp is affixed.

See R. S. O., c. 21, s. 15.

- (14) Every officer paid by fees shall yearly, and on or before the 15th day of January in every year, transmit to the Treasurer of the Province a just, true and faithful account, to be verified upon oath, of the amount of fees paid or payable to him in respect of his office during the preceding year.

See R. S. O., c. 16, s. 37 ; 43 Vic., c. 3.

- (15) The Lieutenant-Governor or the member of the Government having charge of the matter may require the return to state any particulars, or to be made in any form, that may be thought proper, and such return shall be made accordingly.

**65.** No Clerk or Registrar of the Surrogate Court shall for fee or reward draw or advise upon any will or other testamentary paper, or any paper or document connected with the duties of his office for which such fee is not expressly allowed to him by the tariff in that behalf ; and no Clerk of a County Court shall for fee or reward draw or advise upon any chattel mortgage, or any other paper or document connected with the duties of his office and for which a fee is not expressly allowed by the tariff in that behalf.

**66.** There shall be an official Guardian *ad litem* of infants ; and the solicitor heretofore usually appointed by the Court of Chancery as guardian *ad litem* of infants shall be the first Official Guardian, and shall hold office during pleasure as if appointed by the Lieutenant-Governor.

- (a) In case of a vacancy the appointment shall be by the Lieutenant-Governor, as in the case of the other officers of the Courts ; and the person appointed shall be a Barrister-at-Law and Solicitor of this Province, of not less than seven years standing, and shall hold office during pleasure ;
- (b) The official Guardian, besides acting as guardian *ad litem* of infants under Rules of Court and other orders, shall perform such other duties as a Divisional Court or Judge may from time to time direct.

- (2) The same costs as hitherto shall be paid to the guardian by any party; and the same costs as hitherto shall be payable to the guardian out of funds in Court; but all costs so paid to the Guardian by any party in respect of any business done after the commencement of this Act shall be by such Guardian paid forthwith into Court with the privity of the Accountant of the High Court, and shall be placed to the credit of an account to be intituled "Account of Official Guardian *ad litem*;" and all costs payable to the Guardian out of any funds in Court, in respect of any business done after the commencement of this Act shall be transferred to the credit of the same account.
- (3) Where the estate is small, and, in view of the amount at the credit of the said account, the amount or part of the amount payable out of the estate for the Guardian's costs does not appear to be required to pay the salary and disbursements of the official Guardian, the Court may withhold payment out of such estate of the sum or any part of the sum due for the Guardian's costs in respect of such estate; and may distribute the estate as if such costs were not payable by or out of the same.
- (4) There shall be paid to the said Guardian in respect of all business done after the commencement of this Act a fixed salary of such sum per annum as, in view of the amount of business done or to be done by the Guardian, and the sum at the credit of the said account, the said Judges shall think reasonable, and the Lieutenant-Governor in Council approve; which salary shall be over and above all necessary disbursements; and the salary and disbursements shall be paid monthly or otherwise as shall be determined by rule of Court, out of the fund at the credit of the said account of official Guardian *ad litem*, and not otherwise.
- (5) The surplus appearing from time to time at the credit of the said account beyond what may be required to pay the charges on the said account, shall be transferred to the "Suitors' Fee Fund Account."

"*Suitors' Fee Fund.*"—R. S. O., c. 40, s. 104, enacted as follows:—A fee of ten cents shall be paid to the officer with whom pleadings are directed to be filed, on the filing of every bill and of every answer or demurrer in addition to the other fees and charges thereon; and such fee shall be paid into an account to be called "The

Suitor's Fee Fund Account," which account shall be kept and managed as may from time to time be directed by the Court, and the sums at the credit of such account shall be applied by the Court as may be necessary for the protection of infants and other persons not *sui juris* or *non compos mentes*, in whose behalf proceedings may be had in the Court, or may, by the Court be ordered to be had in other Courts. This section so far as it directed payment of any fee to "The Suitor's Fee Fund Account" was repealed by 41 Vic. c. 8, s. 5, O.

- (6) Where the official Guardian has occasion to employ a Solicitor in another County for the purpose of any proceeding in a suit, such Solicitor shall be entitled to receive from the official Guardian in respect of such proceeding the same costs as if the Solicitor so employed were Solicitor and Guardian of the Infant.

"The same costs."—It is presumed that these costs will be taxed costs, and not a portion of the official guardian's salary.

- (7) The Official Guardian *ad litem* shall once every 6 months file in the Accountant's office an affidavit, shewing all costs recovered by him as Official Guardian *ad litem*, during the 6 months preceding the making of such affidavit, giving therein the several amounts received by him, and the name or names of the suits and matters in which the same were respectively received by him, together with the date of receipt.
- (8) When a new official Guardian *ad litem* is appointed, he shall *ipso facto* become, and be by virtue of such appointment, Guardian *ad litem* to all infants, in the place and stead of his predecessor, with the same duties and powers; and the latter (his executors or administrators, as the case may be) shall forthwith deliver over to the new Official Guardian all letters, papers, documents and books in his possession or power as Official or other Guardian *ad litem* of infants; and the new guardian shall forthwith communicate his appointment to whom it may concern.
- (9) The Lieutenant-Governor in Council, or the High Court, may order that the official Guardian is not to practise as a Barrister or Solicitor, and in such case he shall not, during the continuance of his appointment and of such order, directly or indirectly practise the profession of the law as Counsel or Solicitor, or as a Notary Public, or Conveyancer, or do any manner of conveyancing, or prepare any papers or docu-



ments to be used in any Court of this Province, except in the discharge of his duties as official guardian, or of any other duties which may be assigned to him by the said High Court or any Division or Judge thereof as the case may be; and the said official Guardian in case of his offending in the matter aforesaid shall be subject to a penalty of forfeiture of office, and the further penalty of \$400 to be recovered by any person who sues for the same by action in the High Court; and one half of such pecuniary penalty shall belong to the party suing, and the other half to Her Majesty for the use of the Province.

See R. S. O., c. 42, s. 5.

**67.** The Accountant shall yearly and on or before the 15th day of January in every year transmit to the Lieutenant-Governor in Council a just, true and faithful statement, shewing the state of the "Account of official Guardian *ad litem*" upon the 31st day of the preceding December.

See R. S. O., c. 50, s. 121.

**68.** In all cases in which any interest in real or personal estate, effects or property is vested in the Accountant for the time being of the High Court, as such Accountant and in respect of his office, all such real and personal estate, effects and property whatsoever, upon the death, resignation, or removal from office of each and every Accountant of the said Court from time to time, and as often as the case happens, and the appointment of a successor takes place, shall, subject to the same trusts as the same were respectively subject to, vest in the succeeding Accountant by force of this Act.

See R. S. O., c. 40, s. 32.

"Accountant."—See notes to sec. 62.

All lands, mortgages, securities, etc., were by R. S. O., c. 40, s. 31, vested in the Referee in Chambers, and by G. O. Chy., No. 632, bonds and recognizances under C. S. U. C. 12, s. 34, sub-s. 3, or sec. 37, sub-s. 1, and inventories filed in pursuance of sec. 37, sub-s. 2 of the same Statute shall be filed in the office of the Clerk of Records and Writs. See following sub-sections.

- (2) In case of there being at any time no Accountant of the High Court, all mortgages, stocks, funds, annuities and securities whatsoever theretofore standing in the name of any Accountant, or in his custody or power in respect of his office, together with all the interest and estate of the said Accountant in the lands and premises embraced in such mortgages or other

securities, shall become and be, by force of this Act, vested in such other officer as the High Court, by general order, may, from time to time, direct, subject to the same trusts as they may then respectively be subject to.

See R. S. O., c. 40, s. 31.

- (3) All mortgages, stocks, funds, annuities and securities whatsoever, at the time of the commencement of this Act, standing in the name of the Accountant of the Court of Chancery, or of the Referee in Chambers, or any other officer named by the Court for the purpose under the authority of the 31st section of the Chancery Act, or in his custody or power as such Accountant, Referee in Chambers or other officer aforesaid, together with all the interest and estate of the said Accountant, Referee in Chambers or other officer, in the lands and premises embraced in such mortgages or other securities, shall become and be vested in the Accountant of the High Court for the time being, as such Accountant, or in such other officer as the Court by general order may from time to time direct, subject to the same trusts as they may then respectively be subject to.

See R. S. O., c. 40, s. 31.

**69.** The expenses of the Accountant's Office including all salaries shall, from the 1st day of April, 1881, be the first charge on the income arising from the funds in Court.

*"Income."*—The income referred to is probably the interest allowed upon the balances from time to time in the bank in which the Court moneys are deposited.

**70.** The Lieutenant-Governor may from time to time appoint one of the officers of the High Court, or some other competent person, to inspect the offices of the Sheriffs, Local Masters, Deputy Registrars, Deputy Clerks of the Crown, Local Registrars of the High Court, Registrars of Surrogate Court, Clerk of the Peace, and County Crown Attorneys, and Clerks of the County Court, in the respective Counties of the Province.

See 43 Vic., c. 8, s. 24.

The duty of the Inspector for the time being shall be:—

- (1) To make a personal inspection of the said offices and of the books and Court papers belonging thereto respectively;
- (2) To see that proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times, and in a proper form and order, and that the Court papers and documents are properly classified and preserved;
- (3) To ascertain that the duties of the officers are duly and efficiently performed;
- (4) To see that proper costs and charges only are allowed or exacted;
- (5) To ascertain that proper security has been given by any officer required by law to give security;
- (6) To ascertain whether uniformity of practice prevails in the several offices of the High Court and in the County and Surrogate Courts;
- (7) To report upon all such matters, as expeditiously as may be, to the Lieutenant-Governor.

**71.** When the said Inspector has occasion to institute an inquiry into the conduct of any officer in relation to his or their official duties or acts, it shall be lawful for the said Inspector to require such officer, or any other person or persons, to give evidence on oath; and for this purpose the said Inspector shall have the same power to summon such officers and other persons to attend as witnesses, to enforce their attendance, and to compel them to produce books and documents and give evidence, as any Court has in civil cases.

See 43 Vic., c. 8, s. 24.

**72.** The said several officers shall, as often as required by the said Inspector, produce for examination and inspection all books and documents which are required to be kept by them, or which may hereafter be required to be kept by them; and shall report to the Inspector all such matters relating to any cause or proceeding as the Inspector shall require.

See 43 Vic., c. 8, s. 26.

73. Every person who at the commencement of this Act shall be authorized to take recognizances of bail, or to administer oaths and take affidavits and affirmations, in any of the Courts whose jurisdiction is hereby vested in the High Court of Justice, shall be a commissioner for the said purposes in all causes and matters whatsoever which may from time to time be depending in the said High Court.

See Imp. Act of 1873, s. 82; R. S. O., c. 63; s. 80.

## SOLICITORS.

74. From and after the commencement of this Act all persons heretofore admitted as solicitors or attorneys of, or by law empowered to practise in, any Court the jurisdiction of which is hereby vested in the High Court of Justice, shall be called Solicitors of the Supreme Court of Ontario, and shall be entitled to the same privileges, and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed.

The common law title of *Attorney* gives place to the Chancery title of *Solicitor*.

(2) All persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors or attorneys of, or been by law empowered to practise in, any such Courts, shall be entitled to be admitted on payment of the fees now required for admission to the Courts of Queen's Bench, Common Pleas and Chancery, and shall be so admitted by any Divisional Court, and shall be called Solicitors of the Supreme Court of Ontario, and shall, as far as circumstances permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.

(3) Any solicitors or attorneys to whom this section applies shall be deemed to be officers of the said Supreme Court; and that Court, and the High Court of Justice and the Court of Appeal respectively, or any Division or Judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of the Superior Courts or a Judge thereof might, previously to the passing of this Act, have exercised in respect of any solicitor or attorney admitted to practise therein. (See Imp. Act of 1873, s. 87.)

See Imp. Act of 1873, s. 87.

See also the Act respecting Attorneys-at-Law, R. S. O., c. 140 *post*.

## PART VI.

## COUNTY COURTS AND JUDGES.

**75.** Section one of chapter 22 of the Acts of the Legislature of this Province, passed in the 32nd year of her Majesty's reign is repealed, and section 2 of chapter 15, of the Consolidated Statutes of Upper Canada shall not be affected by the said Act or by any other enactment of the Legislature of this Province heretofore passed and purporting to repeal the same.

C. S. U. C. c. 15, s. 2, is as follows:—The Governor shall from time to time appoint, under the Great Seal, one person or two persons, being a barrister or barristers of at least five years' standing at the Bar of Upper Canada, to be the Judge or Junior Judge in each of the said Courts.

32 Vic. c. 22, s. 1, is as follows:—Section two of chapter fifteen of the Consolidated Statutes of Upper Canada, entitled An Act respecting County Courts, is hereby repealed.

**76.** The Judges of the several County Courts shall be Judges of the High Court for the purposes of their jurisdiction in actions in the High Court; and in the exercise of such jurisdiction may be styled "Local Judges of the High Court," and shall, in all causes and actions in the High Court, have, subject to Rules of Court, power and authority to do and perform all such acts, and transact all such business as the Judges of the County Courts have now in actions in the Courts of Queen's Bench and Common Pleas; and to do and perform such other acts and business in respect to matters and causes in and before the High Court as they may by Rules of Court in that behalf from time to time be empowered to do.

See R. S. O. c. 39, s. 29; c. 40, s. 28; c. 50, s. 148; R. Sup. C. O. XXXV. r. 4; R. Sup. C. April, 1880, r. 11.

The powers which the County Court Judges have in respect of actions in the Court of Queen's Bench and Common Pleas are as follows:—

*Chamber applications.*—R. S. O. c. 50, s. 148. In actions in either of the Superior Courts, the Judge or acting Judge of the County Court for the county in which the action has been brought or the venue laid, may, upon the application of the plaintiff or defendant in such action, grant summonses and orders for time to declare, plead, reply or rejoin, and for particulars of demand, or set-off, and may grant summonses and orders for payment of money into Court, for the allowance of bail, or for security for costs; and such Judge of the County Court may hear and determine such applications, grant such summonses, impose such terms, and make such orders as might be granted, imposed and made in the like cases by a Judge of one of the Superior Courts sitting in Chambers.

2. This section shall not apply to any action wherein the venue is laid in the County of York, or to any action wherein the attorney for the defendant, or, in case of two or more defendants, where the attorney for any one or more of them resides in a county or union of counties different from that in which the attorney for the plaintiff, or, if he prosecutes in person, in which the plaintiff resides.

*Orders to Examine*, R. S. O., c. 50, s. 157. Where the attorneys of the plaintiff and defendant reside in the same county, an order for oral examination under the preceding section in any action pending in either of the Superior Courts of Law, may be made by the Judge of the County Court of the said county; but this section shall not apply to the County of York.

*Orders for Writs of Replevin*, R. S. O., c. 53, s. 9. In case a writ of replevin is issued whether with or without an order, or in case any rule or order is made under the seventh or eighth sections, the defendant may, at any time or from time to time, apply to the Court or Judge, on affidavit or otherwise, for a rule or order on the plaintiff to shew cause why the writ, or why the rule or order respecting the same, should not be discharged, or why the same should not be varied or modified, in whole or in part as therein specified, or why all further proceedings under the writ should not be stayed, or why any other relief, to be referred to in the rule or order so applied for, should not be granted to the defendant with respect to the return, safety or sale of the property or any part thereof or otherwise; and the Court or Judge may make such rule or order thereon as, under all the circumstances, best consists with justice between the parties.

*Garnishee Orders*, R. S. O. c. 50, s. 311. In cases in the Superior Courts where the amount claimed as due from any garnishee is within the jurisdiction of a County or Division Court, the order to appear, made under the three hundred and eighth section, shall be for the garnishee to appear before the Judge of the County Court of the county within which the garnishee resides, at some day and place within his county to be appointed in writing by such Judge, and written notice thereof shall be given to the garnishee at the time of the service of the order. By section 312 if the garnishee does not forthwith pay the amount due by him and does not dispute the debt, or if he does not appear before the Judge named in the order at the day and place appointed by such Judge, then such Judge, on proof of service of the order and appointment having been made from days previous, may order execution.

*Writs of Capias*, see R. S. O. c. 67, s. 5.

*Writs of Attachment*, see R. S. O. c. 68, s. 2.

*Power to try actions*, see R. S. O. c. 48, ss. 31-44 in notes to sec. 45.

*Interpleader*, see 44 Vic., c. 7.

**77.** Every County and Division Court shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

See Imp. Act of 1873, s. 89.

**78.** Where in any proceeding before any such County or Division Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the court, such defence or counter-claim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon any such counter-claim:

Provided always, that in such case it shall be lawful for the High Court or any Division or Judge thereof, if it shall be thought fit, on the application of any party to the proceeding, to order that the whole proceeding be transferred from such court to the High Court, or to any Division thereof; and in such case the Record in such proceeding shall be transmitted by the Clerk or other proper officer, of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

See Imp. Act of 1873, s. 90. The application will not be granted *ex parte* Anon. W. N. 1876, 12.

**79.** The Lieutenant-Governor in Council may, with the consent of any County Court or Surrogate Court Judge, commute the fees payable to him under the Surrogate Courts Act for a fixed annual sum; such sum not to exceed the income derived from such fees in some preceding year; and any sum so fixed may, as vacancies occur, be rescinded, or may be varied and the amount increased or diminished; provided that in no case shall any Order in Council name a sum exceeding the receipts for fees during some preceding year.

- (2) In case of such commutation, the like sums and fees heretofore payable to such Judge shall continue to be payable, and shall form part of the Consolidated Revenue Fund of this Province, and shall be payable in stamps, subject to the provisions of the Act respecting Law Stamps.

See R. S. O., c. 40, s. 16.

- (3) Where there is no commutation and the fees aforesaid exceed the sum of \$1,000 in any year, the excess shall be received by the Registrar and paid over to the Treasurer of the Province for the uses of the Province.
- (4) The preceding sub-section shall not apply so as to reduce the amount payable to the Judge in any year to a sum less than the aggregate amount of the fees payable to him for such year in respect of fees provided for by the Consolidated Statutes of Upper Canada, chapter 16, schedule "B," and exclusive of the additional fees assigned to Surrogate Judges by the Act passed in the fortieth year of Her Majesty's reign, chapter 7, schedule "A" (65).



(5) Out of the excess aforesaid a sum not exceeding \$666 may on the authority of an Order in Council be paid to the Junior Judge of the County (if any).

(6) This section, and the several sub-sections thereof, shall operate from the first day of January last.

80. The several rules of law enacted and declared by this Act shall be in force and receive effect in all courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such courts.

See Imp. Act of 1873, s. 91.

## PART VII.

### MISCELLANEOUS PROVISIONS.

81. Every Order in Council determining the commutation allowance or the salary of any Judge, Official Guardian or other officer, under the authority of this Act, shall be laid before the House of Assembly forthwith, if the Legislature is in session at the date of the Order, and if the Legislature is not then in session, the Order is to be laid before the said House within the first seven days of the session next after the Order in Council is made.

(a) In case the Assembly at the said session, or, if the session does not continue for three weeks after the said Order is laid before the House, then at the ensuing session of the Legislature, disapprove by resolution of such Order in Council, either wholly, or so far as relates to any of the persons therein named, the Order in Council, so far as so disapproved of, shall have no effect from the time of such resolution being passed.

82. All books, documents, papers and chattels in the possession of any Court the jurisdiction of which is hereby vested in the High Court of Justice, or of any officer or person attached to any such Court, as such officer, or by reason of his being so attached, shall be dealt with by such officer or person in such manner as the High Court of Justice or the Supreme Court may by order direct; and any person failing to comply with any order made for the purpose of giving effect to this section shall be guilty of a contempt of the Supreme Court.

See Imp. Act of 1873, s. 92.

**83.** Upon proof to the satisfaction of the Judge presiding at the sittings of any Court of the service of a subpoena upon any witness, who fails to attend, or to remain in attendance in accordance with the requirements of the subpoena, and that a sufficient sum for his fees as a witness had been duly paid or tendered to him, and that the presence of such witness is material to the ends of justice, the said Judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him or any other Judge who may thereafter preside at such sittings, to give evidence, and in order to secure his presence as a witness, such witness may be taken on such warrant before the presiding Judge and detained in the custody of the person to whom the warrant is directed, or otherwise, as the presiding Judge may order, until his presence, as such witness, shall be required, or, in the discretion of the said Judge, he may be released on a recognizance (with or without sureties), conditioned for his appearance to give evidence.

See 32 & 33 Vic. (D), c. 30, s. 26 ; 39 Vic. (D), c. 36.

The matters to be proved are (1) service of a subpoena ; (2) failure to attend or to remain in attendance ; (3) payment or tender of a sufficient sum for witness fees ; (4) that the presence of the witness is material to the ends of justice.

**84.** Such warrant may be similar to form No. 184, in appendix J hereto, and may be directed to any sheriff or other officer of the Court, or to any constable, and may be executed in any part of Ontario.

"No. 189" is a misprint for No. 184.

**85.** This Act is not intended to affect, and shall not affect, the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commission for the discharge of civil or criminal business on circuit or otherwise ; or the authority of a Judge or a retired Judge of any of the Superior Courts, or a Judge of a County Court, or one of Her Majesty's Counsel learned in the law, to preside without any commission at any Court of Assize, Oyer and Terminer, and General Gaol Delivery, or at a Court held under this Act in the exercise of the jurisdiction now belonging to Courts of Assize, Oyer and Terminer, and General Gaol Delivery, or the authority of any such Judge or retired Judge of a Superior or County Court, or Counsel learned in the law to hold any sitting for the hearing of causes ; and any such Judge or Counsel shall after the commencement of this Act, have the same authority to preside as aforesaid, or to hold any sitting of the High Court for the hearing of causes in the High Court respectively, which such Judge or Counsel now

has to preside at Courts of Assize, Oyer and Terminer, and General Gaol Delivery, or to hold a sitting of the Court of Chancery for the hearing of causes; and any such Judge or Counsel when presiding as aforesaid with or without a commission, or when holding any sitting as aforesaid, shall be deemed to constitute a Court.

See Imp. Act of 1873, s. 93; C. S. U. C., c. 11, ss. 2-6; 29 & 30 Vic., c. 39; R. S. O. c. 39, ss. 27, 28; c. 40, ss. 23-27; c. 41, ss. 1-10.

"Commissions." See sec. 22 and notes.

**86.** Where a Judge of one of the Superior Courts resigns, or is transferred to another of the said Courts after the passing of this Act, or where after the commencement of this Act a Judge of the Supreme Court resigns his office, and any case which has been fully heard by such Judge, either alone or jointly with other Judges, stands for judgment, he may give judgment therein as if he was still a Judge of the same Court, and any such judgment shall be of the same force and validity as if he were still such Judge, provided that such judgment of the Judge be delivered within six weeks after his said resignation or transfer.

**87.** Nothing in this Act, or in the Schedule thereto, affects or is intended to affect, the practice or procedure in criminal matters, or matters connected with Dominion Controverted Elections, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions. (See Imp. Act of 1875, ss. 19, 21; R. Sup. C., Order 62; R. Sup. C., April, 1880, R. 54.)

See Imp. Act of 1875, ss. 19, 21; R. Sup. C., O. 62; R. Sup. C., April, 1880, r. 54.

As to the jurisdiction of the Court of Chancery in matters of revenue, see *Attorney-General v. Walker*, 3 app. r. 195.

**88.** It shall not be necessary for any Justice of the Peace heretofore or hereafter appointed, for the temporary judicial district of Nipissing, to possess any property qualification whatever, or to be a stated resident within the said district.

See R. S. O., c. 7, s. 7.

**89.** The provisions of the Prison and Asylum Inspection Act, chapter 224 of the Revised Statutes, as to the inspection, construction and repairing of Gaols, shall apply to Court Houses, and the said provisions shall so far as applicable be read as if the words Court House or Court Houses were inserted after the words Gaol or Gaols in the said Act.

## REPEAL.

**90.** From and after the commencement of this Act there shall be repealed, so far as relates to this Province:—

- (1) Sections 15 and 16 of a certain Act of the Parliament of the United Kingdom of Great Britain and Ireland, passed in the fifth and sixth years of the reign of His Majesty King William the Fourth, and chaptered 62; without prejudice to anything done or suffered before the said commencement under the enactments hereby repealed.

See Imp. Act, 22 & 23 Vic., c. 12, s. 2.

- (2) Any enactment inconsistent with this Act.

See Imp. Act of 1875, s. 33.

- (3) Section 3 of the Act respecting the Heir, Devisee and Assignee Commission, chapter 25 of the Revised Statutes, so far as relates to any Judge, who was not appointed until after the 7th of March, 1879, or who may be hereafter appointed.

See Journ. L. A., March 7, 1879, p. 186.

## INTERPRETATION.

**91.** In the construction of this Act and of the Rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include the meanings following (that is to say):

The sections referred to made provision whereby suitors resident in Great Britain and Ireland could give evidence in the colonies by means of declarations.

“Rules of Court” shall include forms.

“Cause” shall include any action, suit, or other original proceeding between a plaintiff and a defendant.

“Suit” shall include action.

“Action” shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court; and shall not include a criminal proceeding by the Crown.

"Plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

"Petitioner" shall include every person making any application to the Court, either by petition, motion, or summons, otherwise than as against any defendant.

"Defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings.

"Party" shall include every person served with notice of, or attending any proceeding, although not named on the Record.

"Matter" shall include every proceeding in the Court not in a cause.

"Pleading" shall include any petition or summons, and shall also include the statement in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant.

"Judgment" shall include decree.

"Order" shall include rule.

"Oath" shall include solemn affirmation and statutory declaration.

"Existing" shall mean existing at the time appointed for the commencement of this Act.

See Imp. Act of 1873, s. 100.

"Proper Officer" shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows:—

- (a) Where any duty to be discharged under this Act or the Rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same, until otherwise provided by Rule;

- (b) Where any new duty is under this Act or the Rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the High Court of Justice, not attached to any Division, by the President of the High Court, and in the case of an officer attached to any Division, by the President of the Division.

See Imp. Act of 1875, O. 63.

[N  
the p  
of th

1.  
in t  
have  
Cour  
Just

Se

Ac  
may b  
the C

Th  
hither  
nume

*Imp*  
Attorn  
the A  
indors  
off the  
Where  
of the  
signed  
Street  
tion "  
(1880)

For  
and at  
(A) No  
the re  
that of

## SCHEDULE.

### RULES OF COURT.

[NOTE. When no other provision is made by the Act or these Rules, the present procedure and practice remain in force. See notes to sec. 12 of the Act.]

#### ORDER I.

##### FORM AND COMMENCEMENT OF ACTION.

###### 1.

1. All actions which have hitherto been commenced by writ **R. I.** in the Superior Courts of Common Law, and all suits which have hitherto been commenced by bill or information in the Court of Chancery, shall be instituted in the High Court of Justice by a proceeding to be called an action.

See Eng. R. Sup. C. 1875, O. I., r. 1.

Action means a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and does not include a criminal proceeding by the Crown, Judicature Act, s. 91.

This rule applies only to (1) actions hitherto commenced by writ, and (2) all suits hitherto commenced by bill or information. It does not affect, therefore, the numerous applications which have hitherto been made on petition.

*Information.*—There is no precedent for dispensing with the signature of the Attorney-General to an information. Where, in the absence from the Province of the Attorney-General, an information was filed without signature, but having indorsed thereon a fiat signed by the Solicitor-General, it was ordered to be taken off the files, *Attorney-General v. The Toronto Street Railway*, 2 Ch. Ch. R. 165. Where an information had been amended by merely adding a party by the direction of the Court, a motion to take the amended information off the files, because not signed by the Attorney-General, was refused, *Attorney-General v. The Toronto Street Railway*, 2 Ch. Ch. R. 321. Since the Judicature Act, the title "Information" should not be used, *Attorney-General v. Shrewsbury Bridge Co.*, W. N. (1880) 23.

Formerly, in Chancery, the plaintiff's residence had to be mentioned in the bill, and at Law the defendant's had to appear. From the forms given in the appendix (A) No 1, it appears that it is now necessary in commencing an action to mention the residence of both parties—that of the defendant in the body of the writ, and that of the plaintiff in the indorsement.



## 2.

**O. I.  
R. 2.**

2. With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Act, R. S. O., chapter 54, save as altered by any Act passed during the present session of the Legislature, shall apply to all actions and to all the Divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence.

See Eng. R. Sup. C., O. I., r. 2.

"Any Act passed during the present session," see 44 Vic. c. 7.

For forms of interpleader orders, see Forms, Nos. 139-145.

## 3.

3. The orders of the Court of Chancery numbered from 467 to 487, and those numbered from 638 to 650, shall apply to all the divisions of the High Court of Justice.

For these orders and notes thereto, see Part III.

## 4.

4. All other proceedings in and applications to the High Court may, subject to these Rules, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Act had not been passed. In case a defendant is let in to defend under the 11th section of the Revised Statutes respecting absconding debtors, the action shall proceed as in ordinary cases under the Act, subject to the provisions in other respects of the said Revised Statute.

See this section considered in note to sec. 12 of the Act (*ante*).

The section of the R. S. O. referred to is as follows:—The special bail (whether put in within the time limited by the writ or within such time as the Court or Judge directs) shall be put in and perfected in like manner as if the defendant had been arrested on a writ of *capias* for the amount sworn to on obtaining the attachment; and after being so put in and perfected the defendant shall be let in to plead, and the action shall proceed as in ordinary cases begun by writ of *capias*.

1. I  
writ o  
the n  
quired  
Court

See  
ss. 3, 25  
It is  
the pre  
plaintiff  
O. III.

2. A  
other  
forms  
the sa

See I  
See a

3. V  
summe  
cases i  
Form  
circum

See R

4. V  
Courts  
writ o  
2, in A  
stances  
subject  
summe  
notice  
variati

## ORDER II.

## WRIT OF SUMMONS AND PROCEDURE, &amp;c.

## 5.

1. Every action in the High Court shall be commenced by a writ of summons, which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and specifying the Division of the High Court to which the action is assigned.

See Eng. R. Sup. C., O. II., r. 1; Eng. R. Sup. C., Sched. (A); R. S. O., c. 50, ss. 3, 29 *et seq.*; c. 67, s. 8 *et seq.*; c. 137.

It is not essential that the indorsement on the writ of summons should set forth the precise ground of complaint, nor the precise remedy or relief to which the plaintiff considers himself entitled, Ord. III., r. 2. See also as to indorsements, O. III., r. 1.

## 6.

2. Any costs occasioned by the use of any more prolix or other forms of writs and of indorsements thereon, than the forms hereinafter prescribed, shall be borne by the party using the same unless the Court shall otherwise direct.

See Eng. R. Sup. C., O. II., r. 2.

See as to powers of taxing officers, O. L., r. 7.

## 7.

3. Where the service is to be made in Ontario, the writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Appendix (A) hereto, with such variations as circumstances may require.

See Eng. R. Sup. C., O. II., r. 3. See note to O. L., r. 1.

## 8.

4. Where there is jurisdiction in any of the Superior Courts to proceed with a suit on a service out of Ontario, the writ of summons to be so served shall be in Form No. 2, in Appendix (A) hereto, with such variations as circumstances may require. Where a defendant is not a British subject, and is not in British Dominions, notice of the writ of summons is to be served in lieu of service of the writ, and such notice shall be in Form No. 3 in the same Part, with such variations as circumstances may require.

O. II.  
R. 4.

See Eng. R. Sup. C., O. II., r. 5, schd. forms 2, 3, R. S. O., c. 50, ss. 48-53; G. O. Chy. 90-102 Eng. C. L. P. Act 1852, s. 19.

*Jurisdiction.*—See O. VII. and notes.

Where a defendant is not within the British Dominions, and is not a British subject, the Queen does not command an appearance, but the defendant is notified of the fact that a writ has been issued, and informed that if he does not appear judgment may be entered. Service of process upon a foreigner not a subject of Her Majesty in another country may involve unpleasant questions of jurisdiction, whereas, if it were not formally served upon, but only notice of the proceedings given to, such foreigner, no such consequences can arise, *Beddington v. Beddington*, L. R. 1 P. D. 426. Where one of the defendants is a foreigner resident abroad, the proper course is to take out a concurrent writ of summons, and to serve a notice of it upon such defendant, *Id.* A writ for service within the jurisdiction was served on two of the defendants at a place out of the jurisdiction. An application was made to set aside the service on the ground of this irregularity. Mr. Dalton refused to make the order asked for, as the plaintiff had not been in fault: the domicile of the defendants being within the jurisdiction; but he gave leave to issue, *nunc pro tunc*, a concurrent writ for service out of the jurisdiction, amendment of the copies served to be made in accordance therewith, costs to be costs in the cause, *Metcalf v. Davis*, 6 Pr. R. 275.

Where a writ of summons in the form prescribed by sec. 2, C. L. P. Act, issued against an American subject resident out of the jurisdiction and described as so resident, was served upon him during a temporary visit to Ontario, a final judgment in default of appearance, signed upon a special indorsement on such writ, was held regular, *Snow v. Cole*, 7 Pr. R. 162.

Where a writ of summons, issued after the appointment of W. M. Ross as Clerk of the Process was signed by his predecessor, and the name of the Court was left blank in the copy served, an amendment was allowed, without costs, *Stevenson v. Williams*, 7 Pr. R. 358.

Where leave had been given in the Chancery Division to serve notice of the writ in lieu of service out of the jurisdiction, an affidavit of service in the form adopted in the Common law division was held sufficient, *Bustros v. Bustros*, L. R. 14 Ch. D. 849.

As to necessity of obtaining an order for leave to issue a writ for service out of the jurisdiction, see notes to O. VII., r. 1 (d).

## 9.

5. Every writ of summons and every other writ shall bear date on the day on which the same is issued, and shall be tested in the name of the President of the High Court of Justice, and shall require the defendant to appear thereto in 10 days after service, if the service is to be made in Ontario.

See Eng. R. Sup. C. O. II., r. 8.

The addition of the latter part of this rule commencing with the words "and shall require" to the English rule has rendered the meaning of the words "every other writ" somewhat obscure. Either every writ (including a writ of *fiery facias*) is to require appearance in 8 days, which would be absurd, or else the words apply only to such writs as by the practice do require appearance in 8 days, and are, therefore, of the most limited meaning, if, indeed, they are wider than the words which they follow.

Supra to appear and service thereof set aside with costs on the ground of an irregularity in the *teste*, *Lord Huntingtower v. Sherborn*, 5 Beav. 162. A writ tested in the name of a retired Chief Justice after his successor has been gazetted, but before his acceptance of office by taking the necessary oaths, is wrong, but this is only an irregularity which may be amended on payment of costs, *Nelson v. Roy*, 3 Pr. R. 226. The absence from the Province of the Chief Justice, does not make it improper to *teste* a writ in his name, *Brett v. Smith*, 1 Pr. R. 309.

The ab  
sealed and  
which mig  
355.

A writ  
præcipe by  
ment there  
any amend

6. The  
allow th  
manner

See Eng.  
Form of  
Form of

After a  
writ is unne

A writ  
of the brief  
Mathias v.

A writ c  
cipe by sub  
there is no  
amendment  
notice requi  
without she  
P. R. 68.

And see

1. In t  
not be es  
or the pr  
himself e  
Judge an  
cause of a

See Eng.  
The indo  
r. 16.

A plai  
the obtaini  
L. R. 1 Ch.  
9

The absence of the signature of the Clerk of the Process upon a writ regularly sealed and issued by the Deputy Clerk of the Crown, was held to be an irregularity, which might be amended under the Ad. Jus. Act, *Labadie v. Darling*, 7 Pr. R. 355. **O. II. R. 5.**

A writ of summons may, after its issue and before service, be amended on præcipe by substituting a new plaintiff, without an order, and on such amendment there is no necessity for resealing, nor need it appear on the copy served that any amendment has been made, *Worthington v. Boulton*, 6 Pr. R. 68.

## 10.

6. The Court or a Judge may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons, in such manner and on such terms, as may seem just.

See Eng. R. Sup. C. Feb., 1876, r. 6.

Form of Præcipe to amend, Forms, No. 75.

Form of Order to amend, Forms, No. 119.

After a delivery of a statement of claim amendment of the indorsement on the writ is unnecessary, *Large v. Large*, W. N. (1877) 198.

A writ may be amended before the order is actually drawn up upon production of the brief in the case endorsed by Counsel, and marked by the Registrar's initials, *Mathias v. Mathias*, W. N. (1876), 214.

A writ of summons may after its issue and before service, be amended on præcipe by substituting a new plaintiff, without an order, and on such amendment there is no necessity for resealing, nor need it appear in the copy served that any amendment has been made. If the writ is specially indorsed for interest the notice required by Common Law Procedure Act, sec. 15, may claim such interest without shewing the date from which it was calculated, *Worthington v. Boulton*, 6 Pr. R. 68.

And see notes to O. II., r. 5; and notes to O. IV., r. 1 (d).

## ORDER III.

## INDORSEMENTS OF CLAIM, &amp;c.

## 11.

1. In the indorsement required by Order 2, Rule 1, it shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may by leave of the Court or Judge amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief. **O. III. R. 1.**

See Eng. R. Sup. C., O. III., r. 2.

The indorsement must be on the copy left with the officer of the Court, O. III., r. 16.

A plaintiff should indorse his writ with a claim for injunction or receiver when the obtaining of either is a substantial object of his action, *Colebourne v. Colebourne*, L. R. 1 Ch. D. 690. In a creditor's action for the administration of an intestate's

**O. III.  
R. 1.**

real and personal estate the writ must be indorsed with a claim by plaintiff "on behalf of himself and all other creditors," *re* Royle, Fryer *v.* Royle, L. R. 5 Ch. D. 540. As to practice in Ontario, however, in administration suits, see G. O. Chy. Nos. 638-650 (*post*) which are expressly included in the new practice. An indorsement will be a pleading if followed by a notice given by the plaintiff that the claim is that which appears by indorsement on the writ, and may be demurred to, *Robertson v. Howard*, 26 W. R. 683.

The various kinds of indorsements must be observed. There is (1) A statement of the nature of the claim made, or of the relief or remedy required, in the action, O. II., r. 1; O. III., r. 1; app. (A.), part II.; (2) Address of plaintiff when he sues in person, or of his solicitor when the writ is issued by a solicitor, O. III., rr. 3, 9; (3) Special indorsement in certain cases, O. III., r. 4; (4) Amount upon payment of which proceedings will be stayed. This is only in cases of claims for debts or liquidated demands. O. III., r. 5; app. A, part II., sec. II.; (5) Actions of account are provided for by O. III., r. 6; (6) Mortgage cases are provided for by O. III., r. 7; (7) If plaintiff sues or defendant is sued in a representative capacity, see O. III., r. 3.

**12.**

2. The indorsement of claim may be to the effect of such of the forms in Part II. of Appendix (A) hereto as shall be applicable to the case, or if none be found applicable then of such other similarly concise form as the nature of the case may require.

See Eng. R. Sup. C., O. III., r. 3.

**13.**

3. If the plaintiff sues in a representative capacity, or if the defendant or any of the defendants is sued in a representative capacity, the indorsement shall shew, in manner appearing by the statement in Appendix (A) hereto, Part II., sec. V., or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

See Eng. R. Sup. C., O. III., r. 4.

*Examples.*—The plaintiff's claim is as executor of C. D., deceased, for, etc. The plaintiff's claim is against the defendant as heir-at-law of A. B. for, etc.

**14.**

4. In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest,—arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a

guar  
the  
bill,  
spec  
to b

Se  
The  
limite  
Court  
provi  
sidere  
delive

W  
may s  
for a d  
but th  
of serv  
his cla  
r. 6.  
may b  
O. X.  
The So

*Supp*  
indorse  
or cont  
on whic  
been tr  
said :—  
have a  
to appl  
hand it  
such fu  
in the  
marily,  
whethe  
schedul  
O. III.  
full par  
thereto.  
*a fortio*  
share o  
seems t  
him, to

In S  
the inde  
The foll  
amount  
be £49  
4) to ex  
and tha  
draft, w  
which n

In H  
insuffici  
of the in  
agreeme  
1877, wh  
further  
to be pa

In A  
"The p

guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust,—the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

See Eng. R. Sup. C., O. III., r. 6.

This order differs somewhat from R. S. O. c. 50, s. 19. (1) The R. S. O. was limited to "all cases where the defendant resides within the jurisdiction of the Court." (2) The words "or on a trust" were not in the R. S. O. (3) The R. S. O. provided that when the writ was so endorsed, the endorsement should "be considered as particulars of demand; and no further or other particulars need be delivered, unless ordered by the Court or a Judge."

Where the writ is specially indorsed, the plaintiff, in case of non-appearance, may sign final judgment, O. IX. r. 4. If not specially indorsed, and if the claim is for a debt or a liquidated demand, no statement of claim need afterwards be delivered, but the plaintiff may file an affidavit of service of the summons, or of notice in lieu of service, as the case may be, and file and serve a statement of the particulars of his claim, and may, after the expiration of eight days, enter final judgment, O. IX. r. 6. If the writ be specially indorsed and the defendant appears, the defendant may be called on to shew cause why judgment should not be entered against him, O. X. r. 1; and that, even though the defendant may be a corporation, *Shelford v. The South and East Coast, Ry. Co.*, L. R. 4 Ex. D. 317.

*Sufficient Indorsements.*—In *Walker v. Hicks*, L. R. 3 Q. B. D. 8, the writ was indorsed as follows:—"The plaintiffs' claim is £399 9s. 7d., the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiffs were jointly liable, and which bills and notes have been taken up by the plaintiffs." Cockburn, C. J., in holding this insufficient, said:—"The object of the special indorsement is this: on the one hand, it is to have a very prompt and summary effect in favor of the plaintiff, by entitling him to apply to sign final judgment under O. XIV. (Ont. O. X.) and, on the other hand it is intended that the defendant should have an opportunity of avoiding such further proceedings by payment of the debt. I think a party who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist. On looking to the forms of indorsements in the schedule to the rules, I find that in the examples of special indorsements under O. III. r. 6 (Ont. O. III. r. 4), in actions on promissory notes and bills of exchange, full particulars are given of the amount and date of the instrument and the parties thereto. If such particulars must be given when the action is on the bill itself, *à fortiori*, I think they must be given when the claim is, as here, in respect of a share or contribution to the payment of bills and notes paid by the plaintiffs. It seems to me that a party is entitled, before summary proceedings are taken against him, to know specifically what the claim is against him.

In *Smith v. Wilson*, L. R. 4 C. P. D. 392; S. C. in appeal, L. R. 5 C. P. D. 25, the indorsement following was held sufficient:—"The plaintiff's claim is £49.5s. 8d. The following are the particulars." It then went on, "To goods," with dates and amounts, and after giving credit for certain payments, it stated the balance due to be £49 5s. 8d. :—Held a sufficient indorsement under O. III. r. 6 (Ont. O. III. r. 4) to entitle the plaintiff to sign judgment under O. XIV. r. 1 (Ont. O. X. r. 1), and that the indorsement was not vitiated by the insertion therein of a banker's draft, which had been given as payment but was dishonoured, and in respect of which no claim was made.

In *Parpaite Freres v. Dickinson*, 38 L. T. N. S. 178, the following was held insufficient:—"The plaintiffs' claim is £2,323 4s. 7d., being seventy-five per cent. of the invoice price of goods supplied by the plaintiffs to the defendant, under an agreement entered into between the plaintiffs and the defendant in or about March, 1877, whereby the plaintiffs agreed to consign the said goods to the defendant for further consignment by the defendant to Australia, the said seventy-five per cent. to be paid by the defendant in cash on receipt of the goods."

In *Aston v. Hurwitz*, 41 L. T. N. S. 521, the following was held sufficient:—"The plaintiff's claim is for £116 0s. 10d. being the balance due to him from the

**O. III.**  
**R. 4.**

defendant for moneys paid at the said defendant's request and on his behalf, for the purchase of certain stocks and shares between the 3rd June, 1879, and the 31st August, 1879, an account of which has been rendered, and exceeds three folios." In giving judgment Bramwell, L. J., said:—"I think this special indorsement is sufficient. I think that O. III., r. 6, (Ont. O. III., r. 4) was not intended to alter the form of special indorsements which was given by the Common Law Procedure Act, 1852, and which enabled the plaintiff in default of appearance to sign judgment under sec. 27. In my opinion the same form of special indorsement will do now as before the Judicature Acts, and this indorsement would clearly have been enough under the Common Law Procedure Act. According to the indorsement an account has been received by the defendant, and I think that particulars enough have been furnished to give jurisdiction under O. XIV. (Ont. O. X.)."

*Interest.*—In an action on a merchant's account, where the special indorsement claimed interest:—Held, that defendant's non-appearance was an admission of the charge for interest, *Standing et al. v. Torrance et al.*, 4 W. C. L. J. 235. A claim for interest on a demand for specific goods and chattels sold, indorsed on a writ of summons, is good, and cannot be disputed after judgment signed in default of appearance, but if the claim for interest is indorsed to gain an improper advantage, and judgment be signed for more than a plaintiff is entitled to, such judgment will be set aside, *Mearns v. Grand Trunk Railway Company*, 6 U. C. L. J. 62. The indorsement for interest on a specially indorsed writ, is in general a matter of claim only. If it be correct judgment goes rightly for it, without any inquiry, where the plaintiff claims, and the defendant does not dispute it, *McKenzie v. Harris*, 10 U. C. L. J. 213. An indorsement for the balance of an account and for protest charges on an unaccepted draft:—Held, right as to the interest, but not as to the protest charges, *Sinclair v. Chisholm*, 5 Pr. R. 270. If the writ is specially indorsed for interest, the notice required by C. L. P. Act, sec. 15, (R. S. O. s. 19,) may claim such interest without shewing the date from which it is to be calculated, *Worthington v. Boulton*, 6 Pr. R. 68.

R. S. O., c. 50, s. 267, is as follows:—On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, the jury may allow interest to the plaintiff from the time when such debt or sum became payable.

Sub-s. 2. If payable otherwise than by virtue of a written instrument at a certain time, the jury may allow interest from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of such demand.

Notwithstanding this Statute, however, interest has been allowed in many cases where the notice has not been given. In *Spence v. Hector*, 24 U. C. R. 277, it was said that "interest is in practice much more frequently allowed by our juries than English authority would seem to warrant," and in *Michie v. Reynolds*, *Id.* 303, where a sheriff had retained proceeds of an execution in his hands and the Court was itself dealing with the question, *Draper, C. J.*, said:—"Lastly, if the question of interest had been left to the jury, we have no doubt they would have given it to the plaintiffs, considering that the sheriff had retained the proceeds of the executions so long. It has been the practice for a very long time to leave to the discretion of the jury to give interest where the payment of a just debt has been withheld, and we can find no good reason to depart from that practice on the present occasion."

In *Inglis v. The Wellington Hotel Co.*, 29 U. C. C. P. 387, however, where interest was claimed on a sum of \$96, admitted to be due before action commenced, for extra work and materials furnished by the plaintiff, but not under a written contract, and no demand of interest was proved:—Held, that the claim for interest could not be allowed.

It has been held that the above rule does not apply to any case where it is optional with the jury to give interest as they may be advised, according to the justice of the case, *Rodway v. Lucas*, 10 Ex. 672.

A. and B., having become sureties for C., the receiver in a suit in Chancery, and who was to account yearly, were sued for C.'s default, on a specially indorsed writ, and judgment signed for £490 16s. 10d.:—Held, that the claim was not such that a judgment upon a specially indorsed writ could be signed, *Buel v. Whitney*, 11 U. C. C. P. 240. A writ of summons may be specially indorsed as for a balance due on a bill of exchange, even though some of the items forming part of the amount are unliquidated, there being a balance due on the bill itself, *Bank of Montreal v. Harrison*, 4 Pr. R. 331.



An indorsement on a writ of summons as follows :—"1861, Dec. 31st. To balance of account due and owing by the within named defendants at this date for work and labour done and performed by the plaintiff for the defendants, and at their request, and for moneys paid by the plaintiff for the defendants at their like request, \$5,950.47," with the usual claim for interest from that date, was held a sufficient indorsement to entitle the plaintiff to sign judgment on default of appearance; and judgment was set aside only on payment of all costs, and giving security for the debt, *Smart v. The Niagara and Detroit Rivers Railway Co.*, 12 U. C. C. P. 404. "The plaintiff claims \$1,300 for debt, and \$20 for costs, and if the amount thereof be paid to the plaintiffs or their attorney, within eight days from the service thereof, further proceedings will be stayed." The following are the particulars of the plaintiffs' claim : "1865, June 10th, balance of account due from defendant to plaintiffs for goods sold and delivered and money advanced and lent, the items whereof exceeding in all five folios, \$1,129.24." The plaintiffs also claimed interest, etc. :—"Held, sufficient (on the authority of *Hoodsall v. Baxter*, 1 E. B. & E. 844; and *Fromant v. Ashley*, 1 E. & B. 723); *McDonald v. Burton*, 2 U. C. L. J. N. S. 190.

A special indorsement as follows :—"To amount of machines \$500" with several specified credits for cash received was held sufficient, *Northern Railway Co. v. Lister*, 4 Pr. R. 120.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially indorsed this amount upon the writ of summons. He obtained judgment in default of appearance :—"Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O., c. 50, sec. 153, and that the plaintiff was entitled to Superior Court costs, *Davidson v. Cameron*, 8 Pr. R. 61. In *Craig v. Dillon*, 17 U. C. L. J. 121, the defendant agreed to pay to the plaintiff \$200 as liquidated damages if certain loose stones and a partially constructed stone fence were not removed from the plaintiff's land at the time mentioned in the agreement. Held :—"Affirming the judgment of the County Court that the sum mentioned was not a penalty, and that the plaintiff was entitled to receive the sum as liquidated damages on default. That the claim is for a liquidated demand must appear on the face of the indorsement, *Rogers v. Hunt*, 10, Ex. 474.

# 15.

5. Where the plaintiff's claim is for a debt or liquidated demand only, the indorsement, beside stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs, respectively, and shall further state that upon payment thereof within 8 days after service, or, in case of a writ not for service within the jurisdiction, within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the form in Appendix (A) hereto, Part II., sec. II. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

See Eng. R. Sup. C. O. III., r. 7.

The corresponding sec. 18 of R. S. O., c. 50, only applied to actions of debt. The present rule includes actions for "liquidated demands."

If a larger sum than is due be indorsed, proceedings will be stayed, upon payment of the real debt, with costs of the writ only, *Elliston v. Robinson*, 2 Dowl. P. C. 241; *Young v. Crompton*, 2 D. & L. 557. The indorsements must state clearly what is claimed for debt and what for costs, *Truslove v. Whitechurch*, 8 Dowl. P. C., 837.

"The plaintiff claims £85 8s. 6d. for debt, and £— for costs," is irregular, *Truslove v. Whitechurch*, 8 Dowl. P. C. 837.

**O. III.  
R. 5.**

If interest be claimed, the amount must be stated, or the period from which it is reckoned, *Bardell v. Miller*, 7 C. B. 753.

As to the indorsement under this rule supplementing any defect in a special indorsement, see *Worthington v. Boulton*, 6 Fr. R. 68.

*Within 8 Days.*—Both first and last days are inclusive, rules of Trin. Term, 1856, No. 166.

If the last day falls on a Sunday or other day on which the offices are closed, it is sufficient if the act is done on the day on which the offices are next open, O. LII., r. 3.

**16.**

6. In all cases of ordinary account, as, for instance, in the case of a partnership, or executorship, or ordinary trust account, where the plaintiff desires to have an account taken in the first instance, the writ of summons shall be indorsed with a claim that such account be taken. This rule does not apply to proceedings under Order I., Rule 3.

See Eng. R. Sup. C., [O. III., r. 8; G. O. Chy. 467 *et seq.*; 638 *et seq.*

In default of appearance to a writ of summons indorsed under rule 6, and after appearance, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, will be forthwith made, O. XI., r. 1; and as to practice thereon, see O. XI., rr. 1, 2, 3.

Form of indorsement No. 9 (c).

**17.**

7. Where the claim is for the foreclosure of a mortgage or the sale of mortgaged property, and the plaintiff desires an order against a defendant for the immediate delivery of possession, or for immediate payment, the writ must, in addition to the ordinary notice, be indorsed with a further notice to the effect of such of the forms in Appendix (A) hereto, Part II., section VI., as are applicable to the case.

See G. O. Chy. 647.

For practice in mortgage cases see Part III., *post*.

**18.**

8. Where a plaintiff sues by a solicitor, the writ of summons or notice in lieu of service of a writ of summons, shall be indorsed with the solicitor's name or firm and place of business, where writs, notices, petitions, orders, warrants and other documents, proceedings, and written communications may be left for him.

(a)  
solicitor  
of business  
principles

See

Wh  
writ it  
O. I. r.  
which  
demurr  
or firm  
been su  
solicitor  
firm an  
of busin  
it shall  
ceeding  
any per

In  
the nar  
Orders  
or mat

(Cha

to the  
In Cha  
practi  
costs.  
only on  
however  
thereon  
then se  
inbefor  
the rul  
matter,  
practi  
L. R. 1  
and see  
v. Gran  
must p  
the rul  
Judica  
J., said  
of the J  
matters  
the rul  
shall p  
solicitor  
Act is  
of Just  
Q. B. 1  
all case

Join

Mr. W  
bill by  
solicitor  
for the  
Record  
Braith  
Lord R

If t  
indorse  
Sm. 12

(a) Where any such solicitor is only agent of another solicitor, there shall be added to his name or firm and place of business the name or firm and place of business of the principal solicitor. O. III.  
R. 8.

See Eng. R. Sup. C. 1; R. S. O., c. 50, s. 16; G. O. Chy. 40, 41.

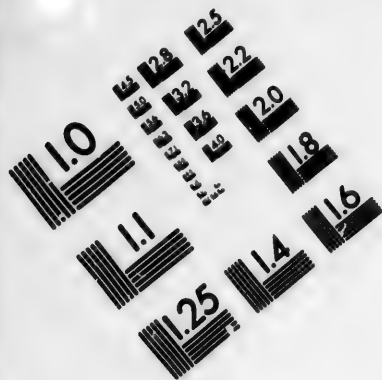
Where a proceeding is commenced by petition or in any other manner than by writ it is conceived that the old practice as to indorsements will continue, see O. I. r. 4. The practice in Chancery was prescribed by G. O. Chy. 40 and 41, which are as follows:—(40) Upon every writ sued out, and upon every bill, demurrer, answer or other pleading or proceeding, there shall be indorsed the name or firm and place of business of the solicitor and solicitors by whom such writ has been sued out, or such pleading or other proceeding has been filed; and when such solicitors are agents only, then there shall be further indorsed thereon the name of firm and place of business of the principal solicitor. (41) Where the name and place of business of a solicitor have been indorsed upon any pleading or proceeding filed, it shall not be necessary to indorse such place of business on any pleading or proceeding in the same cause or matter subsequently filed or subsequently served on any person who was served with the former proceeding.

In *Redman v. Browncombe*, 6 Pr. R. 83, it was held that the indorsement of the name and place of business of the solicitor conducting proceedings is by Con. Orders 40 and 41, required on the first writ sued out, or proceeding filed in a suit or matter, but is not essential on the first papers served.

*Changing Solicitor.*—The practice in Chancery and at Law differed widely as to the manner of procedure in case a party to a suit desired to change his solicitor. In Chancery under G. O. Chy. No. 49, an order could be obtained at any time upon precept, and that without regard to the payment or non-payment of the solicitor's costs. At Law, on the other hand, an order had to be obtained, which was granted only on condition of payment of the first solicitor's costs; see an exception to this, however, in case of a dissolution of a firm of solicitors and a change consequent thereon, *Slater v. Stoddard*, 6 Pr. R. 299. If the point involved is one of principle then sec. 17 of the Act (sub-s. 10) provides that generally in all matters not heretofore particularly mentioned, in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail; and if it be one of practice then the practice which is the more preferable will prevail, see *Wedderburn v. Pickering*, L. R. 13 Ch. D. 769; *Newbiggin-by-the-Sea v. Armstrong*, L. R. 13 Ch. D. 310; and see notes to sec. 12 of the Act. The point came up in *Grant v. Holland*, *Ross v. Grant*, L. R. 3, C. P. D. 180, in which it was decided that the rule of Equity must prevail. *Huddleston, B.*, said:—"There is then a distinct conflict between the rule of Law and the rule of Equity in this respect, and the general scope of the Judicature Acts, 1873 and 1875, is that Law shall cede to Equity." And *Lindley, J.*, said:—"The question then is reduced to the construction of sub-s. 11 of s. 25 of the Judicature Act, 1873 (Ont. Act sec. 17, sub-s. 10), which provides that in all matters in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter, the rules of Equity shall prevail. I do not know why the practice with regard to the changing of solicitors should not be a 'rule of Equity.' The general scope of the Judicature Act is that the should be one uniform administration of justice in the High Court of Justice, as was laid down in the Court of Appeal in *Bustros v. White* (L. R. 1 Q. B. D. 423). Unless there be something to preclude it the rules of Equity are in all case to prevail."

*Joint Solicitor with a Common Agent.*—In *Waldon v. Thompson*, L. R. 6 Eq. 7, Mr. W. Barber asked that the Record and Writ Clerk might be ordered to file a bill by two plaintiffs with an indorsement stating it to be filed by a firm of London solicitors, as agents for two country solicitors, not in partnership, joint solicitors for the plaintiffs. He stated that there was a difference of opinion between the Record and Writ Clerks as to the practice, and cited in support of his application *Braithwaite's Practice* (page 9), and *Forms to Daniell's Chancery Practice* (No. 6a). Lord Romilly, M. R., made the order.

*If there be no indorsement.*—Service of subpoena to appear and answer, without indorsement, may be set aside on speedy application, *Johnson v. Barnes*, 1 D. & Sm. 129; omission of the address for service does not necessarily make the writ



1.8 2.0 2.2 2.5  
3.6 3.2 2.8  
4.0 4.5 5.0

10 01  
11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

**C. III.  
R. 8.**

void, but the Court will stay process until the rule is complied with, *Price v. Webb*, 2 Ha. 511. Attachment discharged with costs, indorsement of subpoena on which it issued being defective, *Barnes v. Twedell*, 1 C. P. Coop. 440. As to waiver by appearing, *Carvick v. Young*, Jac. 524.

Irregularity in the indorsement on a pleading of the name and place of business of the solicitor filing it, is waived by demanding and receiving a copy, *Bennett v. O'Meara*, 2 Ch. Ch. 397.

## 19.

9. Where a plaintiff sues in person, there shall be indorsed upon the writ of summons, or notice in lieu of service of a writ of summons, his place of residence and occupation.

(a) If his place of residence shall be more than 2 miles from the office out of which the first process in the cause shall be issued, there shall be indorsed also another proper place, to be called his address for service, which shall not be more than 2 miles from such office, where writs, notices, petitions, orders, warrants and other documents, proceedings, and written communications not requiring personal service may be left for him.

(b) If the writ or notice is not so indorsed, or if such address or place be more than 2 miles from the office aforesaid, then the opposite party shall be at liberty to proceed by posting up in such office all notices, petitions, orders, warrants and other documents, proceedings and written communications requiring service.

See C. L. P. A.; R. S. O., c. 50, s. 17; Rules of Practice, Trin. Term, 1856, No. 138; G. O. Chy. 44.

## 20.

10. In any action whatever the plaintiff wherever resident may issue a writ of summons out of the proper office in Toronto, or in any County.

See Eng. R. Sup. C., O. V., r. 1; R. S. O., c. 50, s. 10; G. O. Chy., No. 77.

By the C. L. P. A., R. S. O. c. 50, s. 10, the plaintiff could, in all cases in which the cause is transitory, sue out the writ of summons in Toronto, or from the office of any Deputy Clerk of the Crown. By sec. 11, where the cause of action is transitory, the writ had to be sued out from the office within the proper county. Now, however, by O. XXXI. r. 1, there is to be no local venue for the trial of any action, except ejectment.

In Chancery, a plaintiff could file his bill of complaint with the Clerk of Records and Writs, in Toronto, or with any Deputy Registrar in the country, G. O. Chy. 77.

## 21.

11. Writs of summons for the commencement of actions in the Queen's Bench and Common Pleas Divisions, shall

be issued  
the Court  
and shall  
Commence  
before  
actions  
officers  
issued  
Registrar  
sealed

See R.  
Sup. C.,  
Writs  
the Proc.  
R. S. O.  
In Ch.  
Writs in  
77.

12.  
writ of  
appeal

See R.  
In Ch.  
in the fo  
the Clerk  
the bill  
G. O. Ch  
And

13.  
his So  
and pr

See I.  
In Ch.  
printed,  
Act, pro  
foolscap

14.  
the off  
be issu

See I.

be issued by the same officers as now issue like writs for the Courts of Queen's Bench and Common Pleas respectively, and shall be issued alternately in the Queen's Bench and Common Pleas Divisions, as the case may be, as heretofore in the said Courts. Writs for the commencement of actions in the Chancery Division shall be issued by the proper officers hitherto attached to the Court of Chancery. Writs issued by the Clerk of Records and Writs, or by a Deputy Registrar or Deputy Clerk of the Crown and Pleas need not be sealed or signed by the Clerk of the Process.

O. III.  
R. 11.

See R. S. O., c. 39, s. 44; c. 50, s. 3, *et. seq.*; G. O. Chy., Nos. 34-39; Eng. R. Sup. C., O. V., r. 4.

Writs of summons at Common Law are now issued in Toronto by the Clerk of the Process, and in the country by the Deputy Clerks of the Crown, C. L. P. A.; R. S. O. c. 50, ss. 5, 6.

In Chancery, bills are filed with, and writs issued by, the Clerk of Records and Writs in Toronto, and by the Deputy Registrars in the country, G. O. Chy. 23, 34, 77.

## 22.

12. In all cases there shall be a statement on the face of the writ of summons naming the office in which the defendants' appearance is to be entered.

See Eng. R. Sup. C., O. V., rr. 2, 3.

In Chancery, every office copy of a bill served on a defendant had to be indorsed in the form, or to the effect following:—"Your answer is to be filed at the office of the Clerk of Records and Writs, at Osgoode Hall, in the city of Toronto (*or, when the bill is filed in an outer county, at the office of the Deputy Registrar at ———*), G. O. Chy. 86; sched. C.

And see C. L. P. A., R. S. O. c. 50, sched. A, form 1.

## 23.

13. Writs of summons shall be prepared by the plaintiff or his Solicitor, and may be written or printed, or partly written and partly printed.

See Eng. R. Sup. C., O. V., r. 5.

In Chancery, pleadings and all other proceedings in the cause may be written or printed, or partly written and partly printed, G. O. Chy. 66. Under the Judicature Act, proceedings, if printed, are to be so with pica type, leaded, on good paper, of foolscap size, O. Lf. r. 2.

## 24.

14. Every writ of summons shall be signed and sealed by the officer issuing the same, and shall thereupon be deemed to be issued.

See Eng. R. Sup. C. O. V., r. 6.



**G. III**  
**R. 14.**

A writ of summons may, after the issue and before service, be amended on præcipe by substituting a new plaintiff, without an order, and on such amendment there is no necessity for re-sealing, *Worthington v. Boulton*, 6 Fr. R. 68.

When a writ of summons, issued after the appointment of W. M. Ross as Clerk of the Process, was signed by his predecessor, and the name of the Court was left blank in the copy served, an amendment was allowed without costs, *Stevenson v. Williams*, 7 Fr. R. 358. The absence of the signature of the Clerk of the Process upon a writ regularly sealed and issued by the Deputy-Clerk of the Crown, is an irregularity which may be amended under the A. J. Act, *Labadie v. Darling*, 7 Fr. R. 355.

**25.**

15. The plaintiff or his Solicitor may, on presenting any writ of summons for sealing, leave with the officer a copy, written or printed, or partly written and partly printed, of such writ and of all the indorsements thereon, and such copy shall be signed by or for the Solicitor leaving the same, or by the plaintiff himself, if he sues in person.

See Eng. Sup. C. O. V., r. 17.

Upon an indictment for perjury charged as having been committed on the trial of an action, the existence of the action is sufficiently proved by the production, by the officer of the Court, of the copy writ filed under this rule, the *Queen v. Scott*, L. R. 2 Q. B. D. 415.

**26.**

16. The proper officer shall make an entry of every writ of summons in a book to be called the Process Book, which is to be kept in the manner in which process books have heretofore been kept by the Clerks of the Crown and Pleas; and the action shall be distinguished by a number in the manner in which actions are now distinguished in such last mentioned books; and in case of any further proceeding in the action, an entry thereof shall be made in another book to be called the Procedure Book, which is to be kept in the manner in which Procedure Books have heretofore been kept by the said Clerks.

See Eng. R. Sup. C., O. V., r. 8.

**27.**

17. The plaintiff in any action may, at the time of, or at any time during 12 months after, the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked by the officer issuing the same with the word "concurrent," in the margin, and the date of issuing the concurrent writ: Provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

See R.  
Mont  
long vac  
r. 8.

A con  
date of th

Where  
take out  
dant, Be

18. A  
and m  
wherec  
diction  
vice is  
marked  
jurisdi

Leave  
isdiction,  
jurisdiction  
calf v. D

1. E  
on any  
or on l  
or has  
has be

(a)  
the Co  
to be l  
tion, a  
of a c  
have i

"Th  
is given  
importa  
of the l  
"shall l  
in the

See R. Eng. Sup. C. O. VI., r. 1; R. S. O., c. 50, s. 26.

O. III.

R. 17.

Months are calendar months, O. LII., r. 1. In computing the six months, the long vacation is included, *Mullin v. Bonjor*, 5 Ir. C. L. R. 475; and see O. LII. r. 8.

A concurrent writ cannot be issued, except within the time limited from the date of the original writ, *Coles v. Sherwood*, 11 Ex. 482.

Where one of the defendants is a foreigner resident abroad the proper course is to take out a concurrent writ of summons and to serve a notice of it upon such defendant, *Beddington v. Beddington*, L. R. 1 P. D. 426.

## 28.

18. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction.

Leave granted to issue *nunc pro tunc* a concurrent writ for service out of the jurisdiction, to make good a service on a defendant whose domicile was within the jurisdiction, but who had been served out of it with a writ for service within. *Metcalf v. Davis*, 6 Fr. R. 275; see notes to previous rules of this order.

## ORDER IV.

### DISCLOSURE BY SOLICITORS AND PLAINTIFFS.

## 29.

1. Every solicitor whose name shall be signed to or indorsed on any writ of summons shall, on demand in writing made by or on behalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity.

O. IV.

R. 1.

(a) If he answers in the affirmative, then he shall also, in case the Court or a Judge so directs, disclose in writing, within a time to be limited by such Court or Judge, the profession or occupation, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ appears to have issued.

"*The Court or a Judge.*"—Under this and many of the subsequent orders power is given to "the Court or a Judge" to adjudicate upon many matters of trifling importance, and the question at once arises as to the jurisdiction in these matters of the Master in Chambers. Under O. XLIX. r. 6, the Master in Chambers "shall have the power, authority and jurisdiction heretofore in like cases possessed in the Superior Courts respectively by the Clerk of the Crown and Pleas of

**O. IV.**  
**R. 1.**

the Court of Queen's Bench and by the Referee in Chambers of the Court of Chancery;" and by rule 6 (a) of the same order, "The said officer shall not have authority or jurisdiction . . . in respect of any other matter which by these orders is expressly required to be done by a Judge of the High Court." O. LXI. r. 1 provides that:—"A Judge in the preceding orders means a Judge of the Supreme Court, or a Judge having the authority for the time being of a Judge of the High Court, unless there is something in the context indicating a different meaning."

Sec. 62 of the Act provides that, subject to any rules of Court, the Clerks of the Crown and Pleas, the Referee in Chambers, etc., shall respectively have the same judicial and other powers in respect of business in each and every of the Divisions of the High Court as they have now in respect of business of the Court to which they are attached.

No similar question arises in the English practice, for there, *o.* O. LIV. r. 2, the Master has all the jurisdiction of a Judge in Chambers with certain exceptions.

Some of the cases in our Courts may throw some light upon the point. *R. S. O. c. 49, s. 9*, provided that where in any suit it appears that a deceased person who was interested in the matters in question has no legal personal representative, *the Court or a Judge* may either proceed in the absence, etc., or may appoint some person, etc. This section was little more than a copy of the *G. O. Chy. 56*, which had been in existence since 1853. The jurisdiction of the Referee in Chambers was provided for by *G. O. 560* (promulgated 23rd February, 1871), which empowers him to transact such business as "is now" transacted by a Judge in Chambers, with certain exceptions. An application was made in March, 1879, for the appointment of a person to represent an estate. The Referee made the order, holding that "the term *Judge* must be held to include *Referee* in cases coming within his limited jurisdiction." On appeal, *Spragge, C.*, held that "the Statute merely extended a jurisdiction already possessed by the Referee, and, therefore, that this was a proper case for him to decide," *Collver v. Swayzie*, 8 Pr. R. 42. By *G. O. Chy. 640* (promulgated 10th January, 1879, and therefore subsequent to the order conferring jurisdiction upon the Referee), applications may be made to the presiding Judge in Chambers for an order for partition. *Proudfoot, V. C.*, held that an application under this order was properly made to a Judge in Chambers, and not to the Referee, *re Arnott & Chatterton v. Chatterton*, 8 Pr. R. 39. By 36 Vic. c. 8, s. 36, "the Court or a Judge in Chambers" may call on a judgment debtor to shew cause why his equitable interests should not be sold under execution. *Blake, V. C.*, directed the matter to be heard before a Judge in Chambers, *Wark v. Moulton*, 7 Pr. R. 144. By 36 Vic. c. 8, s. 35, "the Court or a Judge in Chambers" may call upon a debtor and a grantee of his lands to shew cause why the lands should not be sold to pay an execution creditor's debt. *Spragge, C.*, held that the Referee had no jurisdiction to make any order under this section, *Queen v. Smith*, 7 Pr. R. 429.

*R. S. O. c. 36, s. 18*, provides that certain issues shall be tried as theretofore unless "the Court . . . or a Judge thereof . . . directs, etc." Mr. Dalton derived his jurisdiction under 33 Vic. c. 11, s. 5. This section empowers the Judges to make rules for empowering the Clerk of the Crown to transact any such business, etc., as is now transacted, etc., by a Judge sitting at Chambers. In pursuance of this Statute, the Judges, by the rules of Hilary Term, 1870 (29 U. C. R. 623), ordered that the Clerk of the Crown and Pleas of the Court of Queen's Bench should be, and he thereby was, empowered to transact all such business, etc., as was then transacted, etc., by a Judge sitting at Chambers, subject to certain exceptions. The Statute, 37 Vic. c. 7, s. 47, provided that "The authority conferred upon the Judges therein mentioned by the fifth section of the Act respecting proceedings in Judges' Chambers, passed in the thirty-third year of Her Majesty's reign, shall, subject to the exception therein contained, extend to empowering the Clerk of the Crown and Pleas of the Court of Queen's Bench to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction as are now, or may be hereafter, done, transacted or exercised by a Judge of either of the Superior Courts of Law sitting at Chambers, and the words 'Judge's order' and 'order of a Judge,' and other like expressions in any Act of the Legislature of Ontario, when referring to an order of a Judge of a Superior Court of Law, shall include an order made by the said Clerk under the authority of the said section, unless there is something in the context indicating a different meaning." Held:—That Mr. Dalton had power to make an order under the section first quoted, *Bennett v. Tregent*, 25 U. C. C. P. 443.

In *Jackson v. Randall*, 24 U. C. C. P. 87, the Jurisdiction of a Judge at Chambers in a matter where the Court had jurisdiction at common law was discussed,

Hagart  
clearly  
The he  
any spe  
power  
at Cha  
clear o  
legislat  
the righ  
in this  
disposi  
the Cou  
don, 6  
the Leg  
receive  
the Ju  
ferred  
gather  
clear, t  
withou  
commo  
therefo  
that, a  
Chambr

In a  
collect  
ed.) 15  
may be  
jurisdi  
applic  
vice ver  
either  
Superi  
the Ac  
of a Ju  
that th  
that he  
held to  
damag  
the Ju  
7 Dow  
774.  
set asid  
with o  
before  
the Co  
321; i  
alone  
payme  
expres  
this n  
aside,  
speak  
Churc

Th  
and c

1.  
Cham  
be so  
cation  
r. 12,  
secuti

2.  
are of  
Judge

Hagarty, C. J., there said:—"Then can the Judge in Chambers do what this Court clearly can do? The case of *Smeeton v. Collier*, 1 Ex. 457, is a direct authority. The head note sums up the result:—"Where a statute, in general terms and without any special limitation, either express or to be inferred from its terms, gives any power to one of the Superior Courts, that power may be exercised by a Judge at Chambers as the delegate of the Court." The judgment of Parke, B., is very clear on that point. It is, of course, to be considered that here there is no express legislative authority to either the Court or a Judge to set aside the attachment, and the right has to rest on the general power of the Court over its process. The Judge in this case must be considered as sitting in Chambers as 'the deputy of the Court disposing of applications which, but for the press of business, would be disposed of by the Court itself.' See also the cases in the note to *Kilkenny, etc., R. W. Co. v. Feildon*, 6 Ex. 83. According to *Sweetman v. Collier*, Pollock, C. B., says:—"Where the Legislature simply gives a power to the Court, it is to be taken that the Court receives all the ordinary powers necessary for that purpose; and it is intended that the Judge should exercise these powers. No distinction exists between powers conferred by statute and those existing at common law, unless a distinction is to be gathered from the terms of the statute. Alderson, B., says:—"I take it to be clear, that, where the Legislature gives the Court any powers in general terms, and without any express limitation, it is the same as if these powers were given by the common law." The common law power of the Court over its own process can therefore be exercised by a Judge in Chambers. It was never doubted, we think, that, at all events as to *mesne process*, the power to set aside could be exercised in Chambers."

In *re Allen*, 31 U. C. R. 458, the point was also discussed, and the authorities collected. The more important of them are here given:—"Ch. Arch. Prac. (11th ed.), 1586, it is said, in some cases, instead of applying to the Court, an application may be made to a Judge at Chambers, and in some cases the latter has exclusive jurisdiction. . . . When a Statute expressly or implicitly directs that the application shall be made only to the Court, a Judge has no power to interfere, and *vice versa*, but when a Statute in general terms, and without any special limitation either expressed or to be inferred from its terms, gives any power to one of the Superior Courts, that power may be exercised by a Judge at Chambers. Under the Act, 1 & 2 Vic., c. 110, it is provided that if it be shewn to the satisfaction of a Judge of one of the Superior Courts that there is probable cause for believing that the defendant is about to quit England unless forthwith apprehended, and that he is indebted to the plaintiff, etc., the Judge shall direct the defendant to be held to bail for such sum as he shall think fit, not exceeding the amount of debt or damage. This corresponds with our own Con. Stat. U. C. c. 24, sec. 5. In such a case the Judge alone can make the order for arrest, and not the Court, *Harvey v. O'Meara*, 7 Dowl. 735; *Bentley v. Berry*, 7 M. & W. 146; *Barnett v. Crow*, 1 Dowl. N. S. 774. By the sixth section of the Imperial Act, 1 & 2 Vic., c. 110, the Court may set aside the arrest, when ordered by a Judge, on insufficient grounds. This agrees with our C. L. P. Act, sec. 31. But it is said in Ch. Arch. Prac. (11th ed.) 782, that before the English Act, when arrests were made, as in *trover*, under a Judge's order, the Court would review the proceedings of the Judge, *Clarke v. Cawthorne*, 7 T. R. 321; *Wolley v. Thomas*, 7 T. R. 550. Under the same Imperial Statute a Judge alone has power to make an order charging stock in the public funds with the payment of the judgment debt; and Lord Abinger, C. B., said:—"The Statute expressly gives to the Judge, and not to the Court, the power of making orders of this nature. If he thinks fit to make an order, the Court has authority to set it aside, but we have no original jurisdiction to make such an order," *Parke, B.*, speaks in the like way, *Brown v. Bamford*, 9 M. & W. 42; see also *Fowler v. Churchill*, 11 M. & W. 57; *Morris v. Manesty*, 9 Jur. 1034."

There is much in the present Act and rules upon which to base arguments *pro* and *con*.

1. Form No. 11 is a form of a notice of motion returnable before the Master in Chambers. Some of the orders which are given as examples of those which may be so applied for are: (a) for final judgment under O. X., which authorizes an application to the Court or a Judge; (b) for particulars as to partners under O. XII., r. 12, which authorizes an application to a Judge; (c) to dismiss for want of prosecution under O. XXV., which authorizes an application to the Court or a Judge.

2. The forms Nos. 110, 111, 112, 114, 119, 124, 129, 131, 132, 133, '34, and 135, are of orders made in pursuance of rules which give authority to "the Court or a Judge" and are yet by the forms assumed to be within the jurisdiction of the

O. IV.  
R. 1.

Master in Chambers, as shewn by the words which precede the style of cause "*(name of the Judge or Master)*."

3. The forms Nos. 113 and 120 are of orders made in pursuance of rules which give authority to "a Judge"; and form No. 126 of an order made in pursuance of a rule which directs that the application "shall be to a Judge," and are assumed by the forms to be within the jurisdiction of the Master in Chambers.

4. The forms Nos. 115, 116, 117 are of orders made in pursuance of Order X., in which the words "Court or a Judge" are used in some places and "a Judge" in others, and are assumed by the forms to be within the jurisdiction of the Master in Chambers.

5. The form No. 130 is of an order made in pursuance of section 47 of the Act, which provides that such orders may be made "by the Court or by any Divisional Court or Judge before whom such cause or matter may be pending"; and is assumed by the form to be within the jurisdiction of the Master in Chambers.

6. Form No. 125 is of an order to produce, which under O. XXVII., r. 4, may be issued on præcipe; and form No. 138 is of an order for examination of a judgment debtor, which is rendered unnecessary by O. XLI., r. 1, and yet are assumed by the forms to be orders which should be made by a Judge or the Master in Chambers.

Consider also the use of the words "Court or a Judge" in the following orders:—O. XVI., r. 6; O. XIX., r. 1 (b); O. XXV., rr. 11 & 12; O. XXVII., r. 2; O. XXXI., rr. 17 & 18; of the words "to the Court or a Judge in Chambers" in O. XXII., r. 7; of the words "to a Judge" in O. XII., r. 12; O. XXVII., rr. 15 & 16, and compare r. 17; and of the words "Judge in Chambers" in O. XXXIV., r. 1.

(b) If such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

"Court or a Judge." See notes to O. IV. r. 1 (a).

There existed a difference between the practice in Chancery and at Law in cases where a solicitor assumed to act for a plaintiff without authority. In Chancery it was held that the plaintiff was liable to the defendant for his costs, and that the plaintiff must recover them if he can from the solicitor. In *Palmer v. Walesby*, L. R. 3 Ch. App. 732, 735, Wood L. J. said: "The very circumstance of a solicitor using the name of a person as plaintiff involves the person whose name is so used in liability to the defendants since they are not bound to look to the authority of the solicitor." At law, however, as was held in *Reynolds v. Howell*, L. R. 3 Q. B. 398, the plaintiff could obtain an order, staying all proceedings without costs. The point came up in *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, L. R. 13 Ch. D. 310, and it was held that where a solicitor has commenced an action, in the name of the plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant, as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff, as between solicitor and client, and the costs of the defendant as between party and party. In cases where no rule of practice is laid down by the new orders, and there is a variance in the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the Court most convenient. See notes to sec. 12 of the Act.

In *Nurse v. Durnford*, L. R. 13 Ch. D. 764, under similar circumstances on motion by the defendants, to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record:—Held, that the solicitors to the record who had purported to act for the said plaintiff were liable to pay his costs of the motion, as between solicitor and client, and also to pay the costs of the defendants of the action and all motions therein. It appearing that the solicitors had inserted the plaintiff's name, through the fault of a deceased co-plaintiff: *semble*, they would have a right of proof for the costs they were ordered to pay against his estate.

For cases in our own Courts see *Robe v. Reid*, 1 Ch. R. (C. L.) 98; *Smith v. Turnbull*, 1 Pr. R. 88; *Shaw v. Ormiston*, 2 Pr. R. 152; *Meyers v. Lake*, 1 Gr. 305; *Chisholm v. Sheldon*, 1 Gr. 294; *Miller v. Hill*, 4 U. C. L. J. N. S. 78; *Fanderson v. McMahon*, 12 U. C. R. 288; *Moran v. Schermerhorn*, 2 Pr. R. 261; *Warely v. Poapat*, 7 U. C. L. J. 294; *Ellison v. Ellison*, 9 U. C. L. J. 245; *Quantz v. Smelser*, 6 Pr. R. 126.

## 30.

2. Where a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitor, shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm.

(a) If the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct.

Under O. XII. r. 12, any party to an action may make the demand.

(b) Where the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ; but all proceedings shall, nevertheless, continue in the name of the firm.

See Eng. R. Sup. C., O. VII. r. 2.

The various rules relating to partnership are here collected.

*Service upon partners.*—Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or, at the principal place within Ontario of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm, O. VI. r. 8.

*Appearance by partners.*—Where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm, O. VIII. 8.

Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm, O. VIII. r. 9.

*Partners parties to actions.*—Any two or more persons claiming, or being liable, as co-partners, may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct, O. XII. r. 12.

Any person carrying on business in the name of a firm, apparently consisting of more than one person, may be sued in the name of such firm, O. XII., r. 13.

*Judgment against partners.*—Where a judgment is against partners in the name of the firm, execution may issue in manner following:—

(a) Against any property of the partners as such;



**O. IV.  
R. 2.**

- (b) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner ;  
(c) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do ; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined. O. XXXVIII. r. 8.

O. XXVII. r. 18, providing for an attachment in case of failure to comply with any order for discovery, does not apply to an order made under these rules for disclosure of the names and residences of partners, *Pike v. Keene*, 24 W. R. 322.

A judgment recovered against the two defendants, who were partners, was paid by the defendant G., who thereupon issued execution against his co-defendant S., on the judgment for half the amount. It appeared that the partnership accounts were unsettled, and that an award had been made in favour of S., the validity of which was disputed by G. :—Held, that under 26 Vic., c. 45, sec. 4, the execution was improperly issued ; and it was set aside, *Scripture v. Gordon*, 7 P. R. 164.

“*Court or Judge.*”—See notes to O. IV., r. 1 (a).

## ORDER V.

### RENEWAL OF WRIT.

#### 31.

**O. V.  
R. 1.**

1. No original writ of summons shall be in force for more than 12 months from the day of the date thereof, including the day of such date ; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the 12 months, apply to a Judge for leave to serve the writ after, and notwithstanding the lapse of, the said period.

(a) The Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the service shall be good if made within 12 months from the date of the order ; and so from time to time during the currency of the further period allowed.

(b) The writ shall in such case be renewed by being marked with the date of the day, month and year of such renewal ; such renewal to be so marked by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 76, in Appendix E.

(c) In such case the original writ shall be available, to prevent the operation of any statute whereby the time for the

comm  
poses

See  
93—98.

“ M  
“ Be  
effect t  
then to  
of sum  
the iss  
Chy. 31  
in the  
amendi  
for whi  
the Act  
Act, or

Acti  
order w  
the tim  
the abs  
Kaufma

O. L  
Sunday  
ing expi  
thereof  
proceedi  
be duly  
be open

Loss  
no power  
v. Garlan

Lis P  
pendens  
such a c  
currency  
ance, he  
Changer  
a bill rer  
the bill  
v. Roseb  
Insuranc  
might in  
motion w  
a direct  
where B  
in Cham  
to pursu  
early hea  
but wher  
words of  
L. R. 10  
course m  
appearan  
case the p  
of defenc

“ Res  
Under th  
used in e



commencement of the action is limited and for all other purposes, from the date of the original issue of the writ. O. V.  
R. 1.

See Eng. R. Sup. C., O. VIII., r. 1; R. S. O., c. 50, ss. 27-29; G. O. Chy. 93-98.

"Months."—The word *months* means calendar months, O. LII., r. 1.

"Before the expiration of the 12 months."—The practice in Chancery has been to effect the service, notwithstanding the lapse of the time limited for service and then to apply for an order allowing the service, G. O. Chy. 96-98. When a writ of summons has been amended, the 12 months must be reckoned from the date of the issue and not from the date of amendment, *re Jones, Eyre v. Cox*, 46 L. J. Chy. 316. By O. LII., r. 8, the time of the long vacation shall not be recovered in the computation of the times appointed or allowed by these rules for filing, amending or delivering any pleading, or in the times allowed for other purposes for which the same is not reckoned by the practice of the Courts consolidated by the Act, or any or either of them, or for the like proceedings substituted by the Act, or these rules; unless otherwise directed by a Court or a Judge.

Acting under this rule and notwithstanding the lapse of the 12 months, an order was made permitting service, *re Jones, Eyre v. Cox*, 46 L. J. Chy. 316. But the time cannot be extended under this order where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations, *Doyle v. Kaufman*, L. R. 3 Q. B. D. 340.

O. LII., r. 4, makes provision for the last day for doing any act falling upon a Sunday. It provides that where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

*Loss of Writ.*—Where an original writ of summons has been lost the Court has no power to allow a renewal of it by ordering a verified copy to be sealed, *Davies v. Garland*, L. R. 1 Q. B. D. 250.

*Lis Pendens.*—It is presumed that the right to issue and register a certificate of *lis pendens* still exists. Can then a plaintiff, by wantonly issuing a writ and registering such a certificate, create a cloud upon any defendant's title which will last during the currency of the writ and the additional three months within which, after appearance, he is at liberty to file his statement of claim? Under the former practice in Chancery a bill had to be served within twelve weeks (except in special cases). If a bill remained after that period unserved an application might be made to dismiss the bill for want of prosecution, see *Somerville v. Kerr*, 2 Ch. Ch. R. 154; *Moore v. Roseburg*, 2 Ch. Ch. R. 406; *Poulton v. Lee*, 7 Pr. R. 415; see also *re Western Insurance Company*, 6 P. R. 86. If the suit is purely illusory an application might indeed be made to take the bill off the files, but the material necessary for the motion was the same as on an application at law to strike out a defendant's plea, a direct admission of the fact by the party himself, *Jameson v. Lang*, 7 Pr. R. 404, where Blake, V.-C., said:—"When such an application comes before the Referee in Chambers and there is no doubt of its being a fictitious suit, a convenient course to pursue would be to enlarge the motion before a Judge, who might then direct an early hearing." Perhaps this suggestion may be followed in a purely illusory suit, but where there is some colour of claim it does not apply at all events under the words of the V.-C. See also as to staying groundless actions, *Castro v. Murray*, L. R. 10 Ex. 213; *Dawkins v. Saxe Weimar*, L. R. 1 Q. B. D. 499. Another course may probably be adopted. The defendant, it is presumed, might enter an appearance even although not served (see *Poulton v. Lee*, 7 Pr. R. 415), in which case the plaintiff would be bound under O. XVII. r. 1 (a) to deliver his statement of defence within three months from the appearance.

"Reasonable efforts have been made to serve such defendant, or for other good reason." Under the G. O. Chy. 96, it was necessary to shew "that due diligence has been used in effecting service."

## 32.

O. V.  
R. 2.

2. The production of a writ of summons purporting to have been renewed in manner aforesaid shall be sufficient *prima facie* evidence for all purposes, of the writ having been so renewed, and of the commencement of the action as of the date of the issue of the writ in manner provided as aforesaid.

See Eng. R. Sup. C., O. VIII., r. 2; R. S. O., c. 50, s. 28; Eng. C. L. P. Act of 1852, s. 13.

## ORDER VI.

## SERVICE OF WRIT OF SUMMONS.

## 1.—Mode of Service.

## 33.

O. VI.  
R. 1.

1. No service of writ shall be required where the defendant by his solicitor accepts service, and undertakes to enter an appearance.

The corresponding Chancery Order, G. O., Chy. 47, was as follows :—Where an acceptance of service of any bill order or other proceeding, and an undertaking to answer or appear thereto, are given by a solicitor, such acceptance and undertaking are to be equivalent to personal service upon the party for whom the same are given, within the meaning of the order requiring personal service, and an affidavit of personal service is in such case dispensed with.

Under the present rule service is not required where the *defendant* by his *solicitor* accepts service, and undertakes to enter an appearance. The inference is that where (1) a solicitor acts without authority or (2) where he gives an acceptance merely, service is required. The next rule then proceeds to provide for cases "where service is required." Under the former Chancery practice, if both an acceptance and an undertaking were given, the bill might, in default of answer or demurrer, be voted *pro confesso*, and where an acceptance merely was given, a motion might be made in Chambers upon notice for an order *pro confesso*, *Ross v. Hayes*, 6 Gr. 277. Under the present rules the practice is to apply for an attachment against the solicitor under O. VIII., r. 11; or to sign judgment on default of appearance, O. IX., r. 3.

"*Undertakes*."—It is not said that the undertaking is necessarily to be in writing. In *Starratt v. Manning*, 3 U. C. L. J. 10, it was held that an attorney by accepting service undertakes to appear; O. VIII., r. 11, however, authorizes an attachment only in case of a written undertaking, and O. IX., r. 3, speaks of filing the undertaking.

The practice at law was to apply for an attachment as against the attorney. Under the present practice the attorney is liable to an attachment for breach of a written undertaking to appear, O. VIII., r. 11; but if, as is extremely probable, judgment may be signed upon filing the acceptance and undertaking with an affidavit verifying it, under O. IX., r. 3, it is probable that an attachment will not be frequently applied for.

*Acceptance of Service*.—Admissions and acceptances of the service of a bill, order, notice of motion, or other paper, upon the opposite solicitor, need not be verified by affidavit, G. O. Chy. 48. There is no similar provision in the common law practice, and an affidavit of verification would be necessary. Perhaps, as the Chancery practice is in this respect the more reasonable, it will be adopted. See notes to sec. 12 of the Act, and also O. XXVIII., r. 4, where the principle is recognized; but see O. IX., r. 3, where upon filing an acceptance of service and an undertaking to appear, it is required that an affidavit should be filed verifying the undertaking.

*Repudiation of Acceptance.*—Where a solicitor promptly repudiated his acceptance of a paper served after hours, which he admitted without knowing its nature, the service was held bad, *McTavish v. Simpson*, 7 P. R. 145; and see *Wright v. Way*, 8 P. R. 328.

## 34.

2. Where service is required the writ shall, wherever it is practicable, be served by the same person and in the same manner as service is now made; and where personal service is required, if it be made to appear to the Court or Judge on affidavit that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just.

The power possessed by the Court of Chancery as to proceeding in the absence of personal service was large. R. S. O. c. 40, ss. 93, 94, provided as follows:—An absent defendant or respondent may be served at any place out of the jurisdiction of the Court, with a copy of any bill or proceeding, without an application being previously made to the Court for the allowance of such service, and the service shall be allowed on proof to the satisfaction of the Court that the same was duly made. Sec. 94.—Where a defendant or respondent in any suit or matter is absent from the Province, or cannot be found therein to be served, the Court may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant whose residence is unknown, or in any other manner that may be provided or ordered, if the Court, under the circumstances of the case, deems such mode of proceeding conducive to the ends of justice.

The G. O. Chy. 100 and 102 were as follows:—

100. In case it appears to the Court by sufficient evidence that a defendant is absent, or cannot be found, after due diligence, to be served with an office copy of the bill of complaint, the Court may order the defendant to answer or demur within a time to be named in the order, and may direct a copy of the order, together with a notice to the effect set forth in schedule C, hereunder written, to be published in such manner as the Court thinks fit; and, in case the defendant does not answer or demur within the time limited by such order, the Court may order the bill to be taken *pro confesso* in the manner hereinafter provided.

102. The Court may provide for or order service in any other manner that the Court, under the circumstances of the case, deems conducive to the ends of justice.

The notice referred to as in schedule C was as follows:—"C. D., take notice that if you do not answer or demur to the bill, pursuant to the above order, the plaintiff may obtain an order to take the bill as confessed against you, and the Court may grant such relief as he may be entitled to on his own shewing; and you will not receive any further notice of the future proceedings in the cause."

The power at law to proceed in the absence of personal service was more limited than in Chancery. R. S. O. c. 50, s. 20, provided that "if it appears to such Court or Judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, such Court or Judge may by order grant leave to the plaintiff to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge seem fit."

The present rule is very comprehensive, and permits substituted service in cases where the Court of Chancery would not have heretofore dispensed with personal service. The cases below, decided prior to the Judicature Act, must therefore be taken as shewing the former practice, but nevertheless useful and necessary to a correct appreciation of the new system.

Personal service means, serving the defendant with a copy of the writ, and shewing him the original, if he desire it, *Goggs v. Lord Huntingtower*, 1 D. & L.

O. VI.  
R. 9.

599. The copy of the writ must be left with and not merely shewn to the defendant, *Worley v. Glover*, 2 Str. 877; and even though defendant refuse to take the copy, if the person serving it bring it away with him, the service will be defective, *Pigeon v. Bruce*, 8 Taunt. 410; *Erwin v. Powley*, 2 U. C. R. 270.

The original writ need not be shewn, unless the defendant at or within a reasonable time after service, make a demand to see it, *Thomas v. Pearce*, 2 B. & C. 761; *Petit v. Ambrose*, 6 M. & S. 274; a quarter of an hour held to be reasonable time, *Wesley v. Jones*, 5 Moore, 162.

The principle on which orders for substituted service are granted is, that there is reasonable ground to believe that the service will come to the party's own knowledge, *Hope v. Hope*, 19 Beav. 237; 4 D. M. & G. 328; *Hart v. Lever*, 5 Ves. 147; *Heald v. Hay*, 9 W. R. 369; *Dicker v. Clarke*, 11 W. R. 635.

Thus, when a bill was filed to stay an action at law, and the plaintiff at law was out of the jurisdiction, the plaintiff in equity was entitled to an order for service on the attorney in the action at law, *Sergison v. Beavan*, 22 L. J. Ch. 287; *Hammond v. Walker*, 3 Jur. N. S. 686; *Hurst v. Hurst*, 1 D. & Sm. 694; *Howkins v. Bennett*, 1 Giff. 215. And substituted service may be allowed, though the defendant is not absconding, but is residing permanently abroad, *Griffiths v. Cowper*, 2 D. F. & J. 208.

The application should be made *ex parte*, *Danford v. Cameron*, 8 Ha. 329; and a plaintiff moving upon notice may be ordered to pay costs, *Reed v. Barton*, 28 L. T. 36; and it should be shewn that every effort has been made to effect personal service, *Hope v. Carnegie*, L. R. 1 Eq. 126; *Frith v. Bush*, 11 W. R. 611.

Where an agent is proposed to be served, it must be shewn that he is agent for the particular purposes of the suit, *Bones v. Angier*, 18 Jur. 1,050; or at any rate for a purpose closely connected with the suit, *Passmore v. Nicholls*, 1 Gr. 130; *Cupples v. Yorston*, 2 Ch. Ch. R. 31; *Allan v. Pyper*, 5 U. C. L. J. 118. His admission that he is agent is not sufficient; the fact must be proved, *Legge v. Winstanley*, 3 Gr. 106.

The solicitor in a former suit is not the client's agent for the purpose of substituted service in a fresh suit, though relating to the same matter, *Hurst v. Hurst*, 1 D. & Sm. 694; nor in a cross suit, *Waterton v. Croft*, 5 Sim. 502.

A solicitor who had written for a copy of the bill held not sufficiently an agent for the purpose, *Asiatic Banking Co. v. Anderson*, 13 L. T. N. S. 272. That a person is in communication with the absent party is not sufficient, *Watts v. Hughes*, 8 W. R. 292.

An affidavit in support of an application for substitutional service on an absconding defendant, or to advertise him, should shew what exertions have been made to find him, *Murney v. Knapp*, 1 Ch. Ch. R. 26; *Irving v. Strait*, *ib.* 185. Service by publication on parties out of the jurisdiction, who cannot be found, will not be ordered on the affidavit of the plaintiff alone, — *v. Corcoran*, 3 Ch. Ch. R. 398.

As to substitutional service, advertising, or service by mailing, see *Stimson v. Stimson*, 6 Gr. 379; *Lepsey v. Cruise*, 1 Ch. Ch. R. 2; *McMurrich v. Hogan*, *ib.* 307; *Pearson v. Campbell*, 2 Ch. Ch. R. 25; *McDonald v. McMillan*, *ib.* 282; *Cameron v. Baker*, *ib.* 281; *Gordon v. Hanna*, 6 P. R. 266; *Wolverhampton and Staffordshire Banking Co. v. Bond*, W. N. (1881).

The provision for "substitution of notice for service" in this rule does not apply to an ordinary case of an absconding defendant within the jurisdiction, *Cook v. Dey*, L. R. 2 Ch. D. 218.

*Prompt service.*—An order was made to serve a defendant who could not, after some attempts, be found at his residence or place of business, to be served by leaving a copy of the writ at both places, and sending a copy through the post addressed to the defendant at both places, *Capes v. Brewer*, W. N. (1875), 193; see also *Hamilton v. Davies*, W. N. (1880) 82. Defendant was in India; an order was made for substituted service upon his solicitors and his managing clerk, W. N. (1875) 238. The defendant to a foreclosure action had absconded; his wife and family did not know his whereabouts, and the plaintiff had been unable to serve him. A motion was made for a receiver, and for directions as to the mode of effecting substituted service, referring to *Cook v. Dey* (2 Ch. D. 218) and *Crane v. Jullion* (*ib.* 220). The Vice-Chancellor:—You may take an order for a receiver. You had better serve your writ by leaving a copy of it with the wife of the defendant, and you must also advertise in the *Times* and *London*

*Gazette*. The advertisements may be so framed as to give notice that in default of **O. VI.** appearance the plaintiff will move for judgment at such time and place as may be **R. 2.** proper, *Bank of Whitehaven v. Thompson*, W. N. (1877), p. 45.

Where effectual personal service could not be made on the persons named as defendants, the Court will not order substituted service, *Sloman v. The Governor and Government of New Zealand*, L. R. 1 C. P. D. 563. A colonial government is not a corporation and cannot be effectually served.

The plaintiff being unable to serve one of the defendants obtained an order for substitutional service, and the action proceeded to judgment against all the defendants. The defendant against whom the order had been made applied to be let in to defend, on the ground that he had a defence on the merits, and that he had never had any notice of the action while pending. Held that as an order for substituted service had been properly made, and service effected under it, the judgment was regular, and that the defendant could not, *ex debito justitiae*, claim to be let in to defend; but that the Court, in exercise of its discretion, could allow him to do so if it were shewn that he had no knowledge of the proceedings and had a defence on the merits and that as the giving leave was discretionary, the Court could impose terms, *Watt v. Barnett*, L. R. 3 Q. B. D. 183, 363.

Service of the writ in an action to recover possession of leasehold houses against an absconding defendant, who had given the tenants notice to pay their rents to him, directed to be effected by leaving a copy of the writ at each of the houses and by advertising, *Crane v. Jullion*, L. R. 2 Ch. D. 220.

See also *Rafael v. Ougley*, 34 L. T. N. S. 124; *Whitely v. Honeywell*, 35 L. T. N. S. 517, 24 W. R. 851; *Hartley v. Dilke*, 35 L. T. N. S. 706, 6.

*Form of Order for substituted service*, see Forms No. 111.

*Form of Advertisement*.—The advertisement should be so framed as to give notice that in default of appearance the plaintiff will move for judgment at such time and place as may be proper, *Bank of Whitehaven v. Thompson*, W. N. (1877) 45. The Form of Order given in Chitty's Forms (11th ed. p. 80) is as follows:—

A. B.	Upon reading the affidavit of	I do order that
v.	(and by sending a copy of each by prepaid post letter addressed to the	service of this order and a copy of the writ, by leaving a copy of each
C. D.	defendant) at the residence (or place of business) of the defendant,	(and by inserting advertisements of the commencement of the
viz	(and by inserting advertisements of the commencement of the	action and of this order in the "London Gazette" and the "Times," and that the
Hughes,	defendant is required to appear herein, otherwise the action will proceed against	him) shall be good and sufficient service of the writ herein.

Dated

"*The same person*."—The sheriffs have been the only persons (if any particular class is intended) who have heretofore been recognized as the proper persons to serve writs. That it is not intended however to require service "wherever it is practicable" to be made by sheriffs may be argued from the form of affidavit of service (No. 32) which is drawn for a solicitor and not for a sheriff's officer.

"*The same manner*."—In Chancery it has not heretofore been necessary to serve the bill personally, service upon a grown-up person at the residence of the defendant was sufficient. *Edgson v. Edgson* 3 D. M. G. 629. *Elliot v. Beard*, 2 Ch. Ch. R. 80. In case of such service, however, the bill could not be noted *pro confesso*; a notice of motion for an order had to be served personally on the defendant, *G. O. Chy. 107*. In ejectment in case of vacant possession, service may be by posting a copy of the writ and notice upon the door of the dwelling house or other conspicuous part of the property, **O. VI. r. 11**. As to service upon married women, infants, lunatics, partners and corporations, see the subsequent rules of this Order.

## 2.—On particular Defendants.

### 3.

3. A married woman shall be served in the same manner as a party to a suit or matter not under any disability is now served; and the like proceedings may be had on such service and with the like effect, as if the married woman were a *feme sole*.



**G. VI.**  
**R. 3.**

See G. O. Chy. 613; R. S. O., c. 125, s. 20.

In Chancery, prior to G. O. 613, it was necessary to obtain an order for a married woman to answer separately from her husband. But by that order it was provided that "Hereafter it shall not be necessary to serve a married woman with an order requiring her to answer separately. A married woman shall be served as a party to a suit or matter, not under any disability is now served, and the like proceedings may be had on such service and with the like effect, as if the married woman were a *feme sole*."

See O. XII, r. 9, as to cases in which married women may sue and be sued as though unmarried.

**36.**

4. Where the action is for the administration or partition of an estate in which an infant is interested or where the action is for any purpose other than the recovery of money from an infant defendant personally, or of lands, goods or chattels, of which he is personally in possession, service on the official guardian shall be good service on the infant defendant if such infant defendant is resident in Ontario, at the time of such service.

See Eng. R. Sup. C., O. IX., r. 4; G. O. Chy. 517-520, 610-612, 616.

See Act, sec. 66 and notes to various sections.

This provision is much more limited than those regulating the practice heretofore prevailing in the Court of Chancery. (1) It applies only to service of writs of summons; see the title of the order. (2) Only to cases in which the infant is resident in Ontario. (3) It does not apply in any of the cases specially excepted, (a) the recovery of money from an infant personally, (b) the recovery of lands, or (c) goods or chattels of which the infant is personally in possession.

(1) It applies only to writs of summons. Where no other provision is made by the Act or rules, the former procedure and practice remain in force, and where there is any conflict, the better practice will prevail, see notes to sec. 12 of the Act; and by sec. 17, sub-s. 10, the rules of equity are to prevail where any conflict exists. The Chancery Practice was regulated by G. O. 610-612, which are as follows:—

610. In any proceeding in the Court in which it may be necessary to appoint a guardian *ad litem* for an infant, the person desiring such appointment shall, upon an allegation contained in the præcipe of the infancy of the person for whom such guardian is sought, be entitled to an order *ex parte* from the Clerk of Records and Writs, or where the bill is filed or the proceedings are taken outside of Toronto, from the Deputy Registrar of the County where such bill is filed, or proceedings are had, appointing a guardian *ad litem* to such infant.

611. With the order appointing such guardian shall be served on the guardian one copy of the proceedings had up to the time of such appointment, or of such part thereof as may be necessary to enable the guardian to protect the interests of the infant to whom he has been appointed guardian. By a circular sent by the Judges to the Clerk of Records and Writs and Deputy Registrars, dated 22nd February, 1875, it was directed that in each order issued under G. O. 610 the name of Mr. John Hoskin should be inserted as guardian, except in cases where he represents the plaintiff, or a person adverse in interest to the infant for whom a guardian is being appointed, when Mr. John S. Ewart should be appointed such guardian.

(2) *Where the defendant is resident in Ontario.*—Will it be necessary if investigating a title to land which has been sold, or the equity of redemption in which has been foreclosed in an action, to see whether an infant so served was resident in Ontario, see *Gunn v. Doble*, 15 Gr. 655; *McLean v. Grant*, 20 Gr. 76.

(3) *The recovery of money or land.*—Does a mortgage suit come within this exception? In *Barwick v. Barwick*, 21 Gr. 39, *Blake, V. C.* held that a suit for fore-

closure of  
of money  
"person"  
exception

(a)  
whom  
only n

(b) I  
shall k  
unless  
be his  
the in  
cate w  
(if any  
whose  
infant  
other  
interes

(c) A  
bers, on  
appoin  
served  
conduc  
a copy  
guardi

See E  
A sui  
having d  
for the s  
nominat  
could be  
Harty, 6  
This c  
to in not

5. W  
the rec  
lands, g  
service  
the wr  
office c

See E  
This  
qualifica

closure or sale is not a suit for the recovery of land, but is a suit for the recovery of money due upon land. See also *Smith v. Hill*, L. R. 9, Ch. D. 143. The word "personally" may however, have the effect of excluding mortgage cases from the exception. O. VI. R. 4.

(a) If in such case there is more than one infant defendant, for whom service is to be made on the official guardian, one copy only need be so served.

(b) From the time of such service the official guardian shall become and be the guardian *ad litem* of the infant, unless and until the Court otherwise orders; and it shall be his duty forthwith to attend actively to the interests of the infant in the action, and for that purpose to communicate with all proper parties, including the father or guardian (if any) of the infant, and also the person with whom or under whose care the infant resides, in case such person is not the infant's father or guardian; and the guardian is to make such other inquiries and to take such other proceedings as the interests of the infant may require.

(c) Any person interested may move before a judge in Chambers, on such material as he may think proper, for an order appointing a guardian other than the official guardian so served; whereupon such order as may be considered most conducive to the interests of the infant shall be made, and a copy of the order shall forthwith be served on the official guardian.

See Eng. R. Sup. C., O. IX, r. 4; G. O. Chy. 517-520, 610-612, 616.

A suit was brought for redemption of mortgaged property, and the mortgagee having died, his widow and infant heirs were the defendants. Upon an application for the appointment of a guardian *ad litem* to the infant defendants, a solicitor nominated by the mother was appointed guardian, it being considered that there could be no conflict of interest between the mother and her children. *Horkins v. Harty*, 6 P. R. 200.

This decision was, however, prior to the G. O. Chy. 610-612 and circular referred to in notes to O. VI. r. 4.

### 37.

5. Where an action is brought against an infant defendant, for the recovery of money from him personally or for the recovery of lands, goods, or chattels of which he is personally in possession, service shall be made on the infant personally, and one copy of the writ shall also be posted (prepaid) to, or delivered at the office of, the official guardian.

See Eng. R. Sup. C., O. IX. r. 4; G. O. Chy. 517-520; see notes to O. IV.

This order requires personal service and does not seem to be subject to the qualification "wherever it is practicable" as in the case of adults under O. VI. r. 2.



**O. VI.  
R. 5.**

If an infant be resident out of the jurisdiction, service can in no case be made upon the official guardian O. VI. r. 4. If resident out of the jurisdiction, and the action is for the recovery of money from him personally, or for the recovery of lands, goods or chattels of which he is personally in possession, and this rule is to be taken literally, personal service cannot be dispensed with.

**38.**

6. Where a lunatic or person of unsound mind not so found by inquisition or judicial declaration, is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant.

See Eng. C. Sup. C., O. IX., r. 5; R. S. O., c. 40, s. 70; c. 220, ss. 49-51; G. O. Chy. 519, 520.

*Inquisition.*—This refers to proceedings under R. S. O., c. 40, s. 59 *et seq.*

Where the lunatic has been so found by inquisition or judicial declaration the committee of the estate generally applies to be appointed guardian to answer and defend the suit which will be ordered as of course, Dan. Chy. Forms, p. 55; but if no committee has been appointed, or the committee has an adverse interest, a guardian will be appointed, *Howlett v. Wilbraham*, 5 Mad. 423; *Worth v. McKenzie*, 3 Mac. & G. 363.

*Committee.*—R. S. O., c. 220, ss. 49, 50, provide as follows:—The Inspector of Prisons and Public Charities shall *ex officio*, and by his name of office, be the committee of every lunatic who has no other committee; and who is detained in any public asylum referred to in the second, third and fourth sections of this Act, and whether such lunatic is detained under an order from the Lieutenant-Governor or otherwise; and the said Inspector and his successors in office, in manner aforesaid, shall be the committees of any lunatic in the Rockwood Asylum at Kingston, who has no committee, and who is detained under an order from the Lieutenant-Governor. The Court of Chancery may at any time appoint a committee of any such lunatic if such Court considers it expedient so to do, and upon such committee being appointed the said Inspector shall, while such other committee exercises such office, cease to be the committee of said lunatic, but the said Inspector, upon delivering up the said lunatic's estate, shall retain so much thereof as may be required to pay any sum then due for maintenance. Notwithstanding another committee may have been appointed by the Court of Chancery, every act of the Inspector of Prisons and Public Charities, as the committee of any lunatic or other insane person, shall be valid and binding upon the estate of such lunatic or other insane person, if done previously to a copy of the order appointing another committee, together with a notice of the persons who have been approved by such Court, as the sureties of such committee, being served upon the said Inspector.

*Service.*—Service on the keeper of an asylum [was allowed, *Thorn v. Smith*, W. N. (1879) 81.

*Default of appearance.*—As to proceedings in default of appearance, see O. IX. r. 1 (a).

**39.**

7. No further proceedings are to be taken against such a defendant who has no committee, until a guardian *ad litem* is appointed.

The mode of proceeding is governed by O. IX. r. 1, (a); see notes to these rules.

8. W  
writ sh  
ners, o  
ness of  
of serv  
ness t  
such se

See F  
The v  
as partie  
O. IV.,  
r. 9, upon  
should b  
name of  
or mana

9. V  
firm a  
sued i  
place  
any p  
manag  
Rules  
on the

See I  
See I

10.  
any w  
corpor  
ber of  
summ

See  
The  
R. S  
and, in  
the ac  
preside  
or on  
poratio  
within

## 3.—On Partners and other Bodies.

## 40.

8. Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or, at the principal place within Ontario of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm.

O. VI.  
R. S.

See Eng. R. Sup. C., O. IX., r. 6.

The various rules as to service upon partners, appearance by partners, partners as parties to an action, and judgment against partners, are collected in the notes to O. IV., r. 2 (b). To enable service of a writ of summons to be made under O. VI., r. 9, upon the defendant's manager, it is not necessary that the defendant himself should be within the jurisdiction. It is enough if he, carrying on business in the name of a firm, has a place of business within the jurisdiction, under the control or management of some person, *O'Neil v. Clason*, 46 L. J. N. S. C. L. 191.

## 41.

9. Where one person carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within Ontario of the business so carried on upon any person having at the time of service the control or management of the business there; and subject to any Rules of Court, such service shall be deemed good service on the person so sued.

See Eng. R. Sup. C., June, 1876, r. 4.

See notes to preceding rule.

## 42.

10. Where, by any statute, provision is made for service of any writ of summons, bill, petition, or other process upon any corporation, or any society or fellowship, or any body or number of persons, whether corporate or otherwise, every writ of summons may be served in the manner so provided.

See Eng. R. Sup. C., O. IX., r. 7.

The following Statutes make provisions for service upon corporations:—

R. S. O., c. 50, s. 21. Every such writ issued against a corporation aggregate, and, in the absence of its appearance by attorney, all papers and proceedings in the action before final judgment may be served on the mayor, warden, reeve, president, or other head officer, or on the township, town, city or county clerk, or on the cashier, manager, treasurer, or secretary, clerk or agent of such corporation, or of any branch or agency thereof in Ontario; and every person who, within Ontario, transacts or carries on any of the business of or any business for any

**O. VI.**  
**R. 10.**

corporation whose chief place of business is without the limits of Ontario, shall, for the purpose of being served with a writ of summons issued against such corporation, be deemed the agent thereof.

Sec. 22. Every writ of summons issued against a railway, telegraph, or express corporation, and all subsequent papers and proceedings in the event of an appearance not having been duly entered, may be served on the agent of such corporation, at any branch or agency thereof, or on any station master of any railway company, or on any telegraph operator, or express agent having charge of any telegraph or express office belonging to such corporation; and any such master, operator or express agent shall, for the purpose of being served with a writ of summons issued against such corporation or any paper or proceeding as aforesaid, in the event of non-appearance, be deemed the agent thereof.

R. S. O., c. 149, s. 43:—"The Act containing General Provisions applicable to Joint Stock Companies incorporated by special Act for certain purposes." Service of all manner of summons or writ whatever upon the Company may be made by leaving a copy thereof at the office or chief place of business of the Company, with any grown person in charge thereof, or elsewhere with the president or secretary thereof; or if the Company has no known office or chief place of business, and has no known president or secretary, then, upon return to that effect duly made, the Court shall order such publication as it may deem requisite to be made in the premises, for at least one month, in at least one newspaper; and such publication shall be held to be due service upon the Company.

R. S. O., c. 150, s. 60. "The Act respecting the incorporation of Joint Stock Companies by Letters Patent." This provision is a copy of Sec. 43, just quoted.

As to Insurance Companies, see 42 Vic. (D) cap. 42, s. 9; R. S. O. c. 160, s. 16; Wilson v. The Aetna Life Insurance Company, 8 P. R. 131; and see Howland v. Grierson, 5 U. C. L. J. 19; Campbell v. Taylor, 1 Ch. Ch. R. 2. If a foreign corporation has a place of business within the jurisdiction, service may be effected on the person in charge, Newby v. Van Oppen, L. R. 7 A. B. 293. Service upon a booking-agent of a Scotch Railway at a station on an English line, was held insufficient, Mackereth v. Glasgow and South-Western R. Co., L. R. 8 Ex. 149, and see Taylor v. Grand Trunk Railway, 4 P. R. 300.

#### 4.—In particular Actions.

##### 43.

11. Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property.

See Eng. R. Sup. C., O. IX. r. 8; R. S. O., c. 51, s. 8.

*In case of a vacant possession.*—Service may be by posting a copy of the writ and notice upon the door of the dwelling-house or other conspicuous part of the property, R. S. O., c. 51, s. 8. And by nailing a copy to a tree upon the land which was a wild lot, Burnham v. Jones, 32 U. C. R. 83.

If the premises have been abandoned, proceedings may be had as on a vacant possession, Doe, d., Laundry v. Roe, 12 C. B. 451; see also Hooper v. Burley, 1 U. C. L. J. N. S. 273; Popplewell & Capreol v. Abbott, 5 O. S. 61.

#### 5.—Generally.

##### 44.

12. The person serving a writ of summons shall, within 3 days at most after such service, indorse on the writ the day of the month and week of the service thereof; otherwise

the plaintiff  
to proceed  
to be ordered  
in no event

(a) I  
day on

See R.  
Act of 1

This  
3 Ch. D.

Three  
reckoned  
last day  
sufficient  
r. 4.

In H.  
leave to  
residing  
Consul  
after ser  
making  
LIL, O.  
and he c  
affidavit

1. S.  
notice  
Judge

(a)  
action  
Ontar  
stock

(b)  
rescin  
such  
are o  
withi

(c)  
contr

the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default without the leave of a Judge, such leave to be obtained at the cost of the plaintiff, and such cost to be in no event charged against the defendant. **O. VI. R. 12.**

(a) Every affidavit of service of such writ shall mention the day on which such indorsement was made.

See Eng. R. Sup. C., O. IX., r. 13; R. S. O. c. 50, s. 25; Eng. C. L. P. Act of 1852, s. 15.

This rule does not apply to cases of substituted service, *Dymond v. Croft*, L. R. 3 Ch. D. 512.

*Three days.*—Holidays are not included, O. LII., r. 2. The days are to be reckoned exclusively of the first day and inclusively of the last, O. LII., r. 3. If the last day falls on a Sunday or other day on which the offices are closed, it will be sufficient if the act is done on the day on which the offices are next open, O. LII., r. 4.

In *Hastings v. Hurley*, W. N. (1881) 39, an order was made giving the plaintiffs leave to serve the writ at Galveston, in Texas, on one of the defendants, who was residing there. The writ was served on him by the British consul there, but the Consul omitted to make the indorsement on the writ within three days at most after service. Vernon R. Smith, for the plaintiffs, now asked that the time for making the indorsement might be extended under r. 6 of Order LVII., (r. 9, O. LII., Ont.) Fry, J., held that he had power under that rule to extend the time, and he extended it for a month. But he said that the Consul must make a new affidavit of service.

## ORDER VII.

### SERVICE OUT OF ONTARIO.

#### 45.

1. Service out of Ontario of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge in the following cases:— **O. VII. R. 1.**

(a) Where the whole or any part of the subject-matter of the action is land, stock, or other property, situate within Ontario, or is any act, deed, will, or thing affecting such land, stock or property;

(b) Where the contract, which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within Ontario;

(c) Where there has been a breach within Ontario of any contract wherever made;

O. VII.  
R. 1.

(d) Where any action or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate, within Ontario;

See R. S. O., c. 50, s. 48; Eng. R. Sup. C., O. II., r. 4; *Ib.*, O. XI.; Eng. R. Sup. C., June, 1876, r. 5; G. O. Chy., 90, 100, 102, 620.

Under this Order, as under the Com. Law Pro. Act, R. S. O., c. 50, s. 50, where the defendant is a foreigner out of the jurisdiction, notice of the writ (Form No. 3, appendix A Part 1) must be served, and not the writ itself, *Westman v. Aktiebolage Ekmans, etc.*, L. R. 1 Ex. 237. The same rule applies to an action in the Chancery Division, as in the Common Law Divisions, notice of the writ, and not the writ itself, must be served, *re Howard, Padley v. Camphausen*, L. R. 10 Ch. D. 550.

This order applies to service of notices on third persons, under O. XII., rr. 19, 20, the *Swansea Shipping Company (Limited) v. Duncan*, L. R. 1 Q. B. D. 644.

These rules apply to foreign corporations, whether they have offices within the jurisdiction or not, *Newby v. Van Open*, L. R. 7 Q. B. 293; *Scott v. Royal Wax Candle Company*, L. R. 1 Q. B. D., 404. As to the power of a foreign corporation to sue, and for an exhaustive review of the authorities with regard to the right of a foreign corporation to contract and carry on business in Ontario, see *Howe Machine Company v. Walker*, U. C. R. 37.

*May be allowed.*—The practice hitherto in Chancery was to await the expiration of the time for answer, and then, if none filed, to move in Chambers for an order *pro confesso*. Upon this application it was necessary to prove the identity of the person served abroad. It was not sufficient for the deponent to the affidavit of service to swear that he served "the above-named defendant." The affidavit was required to shew the means of knowledge, *Armour v. Robertson*, 1 Ch. Ch. R. 252. The plaintiff's solicitor had written to a defendant out of the jurisdiction, and received letters in reply. He had also mailed to him an office-copy of the bill and received a letter acknowledging the receipt of it. An order allowing the service was granted, but a copy was directed to be mailed to the defendant, *Woodside v. the Toronto Street Railway Company*, 2 Ch. Ch. R. 24. A written admission of service, and that the party making it was the defendant in the bill, made by a defendant residing in Montreal, was received as sufficient proof of service, on an affidavit of a party within the jurisdiction proving the hand-writing, being filed, *Erle v. Hunt*, 2 Ch. Ch. R. 395.

The practice at law was to obtain an order for leave to proceed under R. S. O., c. 50, ss. 49 and 50, which are as follows:—

49. Upon the Court or Judge being satisfied that there is a cause of action which arose in Ontario, or in respect of the breach of a contract made therein, and that the writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant willfully neglects to appear to such writ, or that he is living out of Ontario in order to defeat or delay his creditors, such Court or Judge may from time direct that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such Court or Judge (having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case) seem fit; but the plaintiff, before obtaining judgment, shall prove the amount of the debt, or damages claimed by him in such action, either before a judge or jury, on an assessment in the usual mode, or by reference in the manner hereinafter provided, according to the nature of the case, as such Court or Judge may direct.

50. In any action against a person residing out of Ontario and not being a British subject, the like proceedings may be taken as against a British subject resident out of Ontario, except that the plaintiff shall, instead of the writ of summons mentioned in the forty-eighth section, issue a writ of summons in the words or to the effect of Form No. 4 in Schedule A to this Act, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant, which notice shall be in the form also contained in the said Form No. 4; and such service or reasonable efforts to effect the same, shall be of the same force and effect as the service or reasonable efforts to effect the service of a writ of summons in any action against a British subject resident abroad, and by leave of the Court or a Judge, upon its or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.

The pr  
the serv  
fault of a  
of service  
a writ for  
ing rule in  
issue, has  
this fact r  
an order,  
English t  
which is r

In En  
unnecessa  
Royal W  
Ch. D. 27

Contra  
pondence  
given. A  
mailed fr  
v. McDou  
210; and

Breach  
tract was  
machiner  
that it sh  
breach of  
Spittal,  
sec. 18 of  
of ours,  
the act of  
A differ  
of these  
that a co  
agreed, f  
and that  
the juris  
warranty  
and prop  
and used  
breach of  
referred  
Common  
post und

Action  
Whitake  
charge u  
held tha  
tained.  
tween lo  
actions

In B  
way Co  
plaintiff  
offices i  
Buenos  
and for  
station.  
the Arg  
tion we  
plaintiff  
casemen  
rected  
ence of  
of adju

The practice under the present rules seems to be to move for an order allowing the service, see O. VII., r. 4, although O. IX., r. 3, providing for judgment in default of appearance makes no mention of such an order, but requires an affidavit of service merely. In England it is necessary to obtain an order for leave to issue a writ for service out of the jurisdiction, O. II., r. 4, but there is no corresponding rule in the Ontario Act. The form of the order, however, allowing a writ to issue, has been copied among the forms in the appendix to the Act as No. 110, and this fact may leave the question whether it is necessary in Ontario to procure such an order, one for judicial determination. The form is otherwise more applicable to English than Ontario practice, for it prescribes the time for appearance, a matter which is regulated by O. VII., r. 2. *See also as to this part O. XLIX R. 8*

In England it was held that where such an order had been obtained it was unnecessary to obtain a further order giving leave to sign judgment, *Scott v. The Royal Wax Candle Co.*, L. R. 1, Q. B. D. 404; and see *Young v. Brassey*, L. R. 1, Ch. D. 277.

*Contract, where made.*—Where a contract was entered into by means of correspondence, it was deemed to have been made at the place where the final assent was given. An offer written in Kingston to a firm in Montreal, and accepted by letter mailed from Montreal, was deemed to be a contract made in Montreal, *Gildersleeve v. McDougall*, 31, U. C. C. P. 164; and see *McGiverin v. James*, 33 U. C. R. 203, 210; and *O'Donohoe v. Wiley*, 43, U. C. R. 350; *Williams v. Corby*, 5 app. R. 626.

*Breach of Contract.*—In *Gildersleeve v. McDougall*, 31 U. C. C. P. 168, a contract was made out of the jurisdiction for the manufacture and sale of certain machinery to be used within the jurisdiction, and there was the usual warranty that it should be reasonably fit for the purposes for which it was intended. For breach of this warranty an action was brought. Osler J. said "In *Jackson v. Spittal*, L. R. 5 C. P. 542, it was held that the expression 'cause of action' in sec. 18 of the English Common Law Procedure Act which corresponds with sec. 49 of ours, does not mean the whole cause of action, i.e., contract and breach, but the act on the part of defendant which gives the plaintiff his cause of complaint. A difference of opinion existed in the English Courts as to the proper construction of these words, and in *Vaughan v. Weldon*, L. R. 10 C. P. 47, it was announced that a conference of the Judges having been held on the subject, all the Courts had agreed, for the sake of conformity, to act upon the decision in *Jackson v. Spittal*, and that it was sufficient that the breach of the contract should have arisen within the jurisdiction. The cause of action in this case was the breach of the defendant's warranty that the forging manufactured by him for the plaintiff was reasonably fit and proper for the purpose for which it was intended. After it had been delivered and used for some time by the plaintiff in Ontario, it proved defective. The breach of the warranty, therefore, occurred in Ontario; and according to the cases referred to, the cause of action arose there, within the meaning of sec. 49 of the Common Law Procedure Act;" and see *Harris v. Fleming*, L. R. 13, Ch. D. 208, *post* under *contract affected*.

*Action for rent of property out of jurisdiction, but both parties within jurisdiction.*—*Whitaker v. Forbes*, L. R. 1 C. P. D. 51, was an action of debt for arrears of a rent charge upon lands out of the jurisdiction and prior to the Judicature Act. It was held that the venue was local, and that the action, therefore, could not be maintained. It was suggested, however, that the Act, by abolishing the distinction between local and personal actions as regards venue, would for the future render such actions maintainable.

In *Buenos Ayres and Ensenada Port Railway Company v. The Northern Railway Company of Buenos Ayres*, L. R. 2 Q. B. D. 210, claim stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the cost of constructing lines of railway and approaches to the station. Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there; that the premises in question were constructed on land which was the property of the Republic, and that the plaintiffs and defendants were joint concessionaries under the Republic of certain easements appurtenant thereto. That the construction of the premises was directed by the Government of the Republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the Republic powers of adjusting all rights arising out of the construction and applicable to the claim



## C. VII.

## B. 1.

of the plaintiffs were vested in the Government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that the Republic had assumed jurisdiction over the plaintiffs' claim:—Held, on demurrer that the defence was bad, as both parties to the action were within the jurisdiction of the English Courts, and the facts alleged did not shew that the Argentine Republic had exclusive jurisdiction over the claim.

*Slander of title made within, as to property without jurisdiction, defendant being out of jurisdiction.*—In *Casey v. Arnott*, L. R. 2 C. P. D. 24, Grove, J., said:—Our decision in this case must turn on the meaning of Order XI. That Order provides that service of a writ out of the jurisdiction may be allowed whenever the whole or any part of the subject-matter of the action is land, or stock, or other property situate within the jurisdiction, or any act, (deed, will, or thing, affecting such land, stock, or property. I do not think that this case is within the meaning of these words. I do not think that the property can be affected within the meaning of the Order by mere words spoken about it. The words seem to me to point to some effect directly produced upon the thing itself, as when it is physically affected, or the property in it is affected. In this case mere statements were made about the thing, that affected its value in the hands of the owners. It was not the thing itself that was affected, but the minds of intending purchasers.

*Cause of action at sea and defendant out of jurisdiction.*—The ordinary Courts of this country have no jurisdiction over acts done by foreigners on the high seas below low-water mark; consequently, O. XI., r. 1, of the rules of 1875, (Ont. O. VII., r. 1 (e)) does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea, below low-water mark, though within three miles of the English coast, *Harris v. Owners of Franconia*, L. R. 2 C. P. D. 173.

*Proceedings pending in foreign Court.*—In *Norton v. Florence Land and Public Works Company*, L. R. 7 Ch. D. 332, Jessel, M. R., at p. 337, said:—"It seems that those houses being in Florence, the bank has taken proceedings in the Court of Florence, the proper Court, having jurisdiction, to establish their title; and the litigation then to which the plaintiffs are or may be parties being in the Court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this Court should actively interfere between the same litigants. That also appears to me to be an answer to this application."

*Foreign Government.*—In *Tarycross v. Dreyfus*, L. R. 5 Ch. D., at p. 616, Jessel, M. R., said:—"The first and most important point we have to decide is what the meaning of the bond of a foreign government, given to secure the payment of a loan, is. As I understand the law, the municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, as far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the Government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign Government, or even by the ordinary tribunals of the country which issue them, without the consent of the Government of that country. That being so, it appears to me that the bond in question confers no right of action on the plaintiff, and on that ground it seems to me it follows that the demurrer ought to be allowed."

*Contract affected.*—A contract was made with plaintiff out of the jurisdiction for the working of certain mining lands also out of the jurisdiction. Subsequently the defendant, ignoring the plaintiff's rights, entered into another arrangement within the jurisdiction. The plaintiff brought an action claiming a certain interest in the lands, and an injunction restraining the defendants from carrying into effect the second agreement. In giving judgment, Hall, V. C., said:—"The next question is whether this is a case in which the Court can make the order under the provisions of the first rule of Order XI. (Ont. O. VII., r. 1) as to service out of the jurisdiction, which rule is divisible into four branches. Now the first branch of that rule does not seem to be applicable here, nor is the present case capable of being brought within it. The next branch is this: 'whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was entered into or made within the jurisdiction.' That would not of course apply to the original contract under which the plaintiff claims, and which

was made  
unable to  
within the  
I seek to  
cause it  
to be can  
tract, bu  
is with  
Court.  
within the  
receive  
being bu  
to be pu  
the com  
Gold Co  
contract  
contract  
it appea  
to bring  
branch  
contract  
tainable  
has been  
with him  
into wit  
of his pr  
of his ri  
me that  
and I re  
And see

*Mate*  
order is  
as the p  
same, th  
Co. v. M  
the Cou  
have a  
this cou  
there to  
annoyan  
that th  
was iss  
extent,  
clearest  
whom t  
questio  
consequ  
been pu  
that eff  
in Eng  
thing e  
in my  
called o

By  
that th  
of the  
particu  
at law  
see not  
notice

(e)  
the se  
ated,



was made in India, I am not prepared, however, to say that a plaintiff who is unable to bring his own contract within that branch, because it was not made within the jurisdiction, cannot come to the Court and say, 'here is a contract which I seek to have affected by the interposition of the jurisdiction of the Court, because it is one which ought not (having regard to my own contract) to be allowed to be carried into effect; I am not, it is true, entitled to relief upon my own contract, but a contract has been entered into here in violation of my contract, and it is with reference to that second contract that I seek the interposition of the Court.' And I am not, I repeat, prepared to say that such a case would not come within the words of that branch. The whole clause must, as it appears to me, receive a wide construction, so as not to prevent proper and reasonable cases from being brought within it. Therefore, I think, the limited construction attempted to be put upon it is not correct. The contract, which is the immediate subject of the complaint in this action, was made within the jurisdiction, for it is said the Gold Company purchased the property, by their agent in London, and procured a contract from a vendor who signed in London, and they claim the benefit of that contract. That, therefore, is a contract entered into within the jurisdiction, and it appears to me quite sufficient (not putting a narrow construction upon the rule) to bring the contract within it. The rule, however, proceeds further. Its third branch is, 'and whenever there has been a breach within the jurisdiction of any contract wherever made.' And the plaintiff's case is, in my opinion, again sustainable on the ground that within the meaning of that branch of the rule, there has been a breach within the jurisdiction of a contract made and entered into with him in India. There has been that breach of contract by the contract entered into within the jurisdiction to sell this property, ignoring the plaintiff and disposing of his property altogether without regard to his rights, in effect committing a breach of his rights, acquired under his agreement. Therefore, on the whole, it seems to me that the order for service out of the jurisdiction was an order properly made, and I refuse this application with costs." *Harris v. Fleming*, L. R. 13 Ch. D. 208. And see *Cresswell v. Parker*, L. R. 11 Ch. D. 601.

*Material on motion for order allowing service.*—In England, as has been said, an order is obtained for leave to issue the writ and no further order is obtained, but as the point on such a motion and upon a motion to allow the service must be the same, the English authorities will be useful. In *Great Australian Gold Mining Co. v. Martin*, L. R. 5 Ch. D. at p. 10, James, L. J., said:—"It appears to me that the Court, having a discretion (and it is admitted on both sides that the Court must have a discretion in the matter of the service of a writ abroad), before it brings to this country an English gentleman residing in a colony, and holding high office there to litigate a matter which of course must be a subject of great difficulty and annoyance to him, ought to be satisfied that there is really a cause of action and that that cause of action arose within the jurisdiction. But I think, before the writ was issued in the first instance there ought to have been an affidavit of merits to this extent, that is to say an affidavit by the solicitor, or some other person, saying, in the clearest possible way, 'I have been advised and believe that the defendant, against whom the writ is asked for, made a representation with regard to the matters in question, and that that misrepresentation has been used in England, and that in consequence of such misrepresentation so being used in England the company have been put to a considerable expense, and he received the profits,' or something to that effect. That would have been a cause of action, and a cause of action arising in England. There is some difficulty in saying what ought to be done, but something equivalent to that was required by the old Common Law Procedure Act, and, in my opinion, that ought to be now done before any man out of the jurisdiction is called upon to answer anything that anybody chooses to put into a writ of summons."

By O. VII. r. 4 proof must be given to the satisfaction of the Court, or Judge, that the service was duly made, and that the case was a proper one for service out of the Province. To prove service, as has already been shown, considerable particularity had to be observed in identifying the defendant. This was unnecessary at law. The practice which most commends itself to the Judges will be followed, see notes to sec. 12 of the Act. The affidavit of service may either describe the notice or set out a copy of it, *Bustros v. Bustros*, L. R. 14 Ch. D. 849.

(e) Where the action is upon a contract or judgment though the same be not within any of the four classes already enumerated, but it appears to the satisfaction of the Court or a

O. VII.  
R. 1.

Judge that the defendant has assets in Ontario of the value of \$200 at least which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action; and if the defendant does not appear, the Court or a Judge is to give any directions which the Court or Judge from time to time sees fit as to the manner of proceeding in the action, and the conditions on which the same may be proceeded with; and shall require the plaintiff before obtaining judgment to prove his claim and the amount of debt or damages (if any) to the satisfaction of the Court or Judge, and in such mode as the Court or Judge, having reference to the nature of the case, may direct.

This is an extension in an important respect of R. S. O., c. 50, s. 51. Under that statute if the plaintiff had a good cause of action and the defendant had assets in Ontario of the value of \$200, a Judge might "although the contract was made without Ontario, if the breach thereof occurred within Ontario, or in case the suit is upon a judgment, notwithstanding the cause of action wholly arose out of Ontario, direct from time to time that the plaintiff shall be at liberty to proceed." Under the present Act the only matter necessary to be shewn, is that the defendant has assets in Ontario to the value of \$200, at least, which may be rendered liable, etc. The questions of international law which may arise from an assumption of jurisdiction in an action in which the plaintiff and the defendant with ample means to meet all his liabilities, the contract and its breach are all without the jurisdiction are beyond the scope of this work.

#### 46.

2. Where a defendant is served out of Ontario he shall have the time following for entering his appearance and delivering his defence, and both proceedings shall be taken within the time named.

(a) If the defendant is served within any part of the Dominion of Canada (other than Ontario, Manitoba, Keewatin or the North-West Territories, or British Columbia,) or within the United States of America, he is to have 6 weeks after such service.

(b) If served within any part of the United Kingdom (including the Isle of Man and the Channel Islands), or of Manitoba, Keewatin or the North-West Territories, British Columbia, or Newfoundland, he is to have 8 weeks after such service.

(c) If served elsewhere than within the limits above designated, he is to have 12 weeks after such service.

(d) The writ of summons in such case may be in the form

set forth  
served

See G.

These  
vides :—  
ed by the  
any proce  
and any s  
not made

And s.

In Bl  
made shou

3. TH  
terfere  
thereof  
by any  
on appl  
may be  
than the  
tion as

See not

Where  
diction for  
for the ser  
Ch. Ch. R

Where  
an order fo  
1 Ch. Ch.

4. It  
of the v  
but in c  
Judge t  
proper o  
rules, th

See R.

As to n  
the jurisdic

5. No  
which w

See R.

As to s

set forth in Appendix (A), and the statement of claim is to be served therewith. **O. VII. R. 9.**

See G. O. Chy. No. 620.

These periods may be shortened however in a proper case. O. LII. r. 9 provides:—A Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

And see the following rule.

In *Bloomfield v. Brooke*, 6 Pr. R. 205; and *Koen v. Koen* *Id.*, orders were made shortening the time for answer.

#### 47.

3. The preceding rules of this Order are not intended to interfere with or affect the powers of the High Court, or a Judge thereof in the exercise of the jurisdiction heretofore possessed by any or either of the courts hereby consolidated, to direct on application in that behalf, that service in any other manner may be good service, or that the time for defending shall be other than the time above named, or to give any special or other direction as respects proceeding against a defendant out of Ontario.

See notes to Ord. VI. r. 2.

Where the sole defendant in a foreclosure suit had been absent from the jurisdiction for fourteen years, and had not been heard of during that time, a motion for the service of the bill upon him by publication was refused, *Shaw v. Acker*, 1 Ch. Ch. R. 395, *Kelly v. Macklem*, *Id.* 396, n.

Where an absent defendant is an infant, the Court has like powers as to granting an order for service by publication, as in the case of an adult, *Duffy v. O'Connor*, 1 Ch. Ch. R. 393.

#### 48.

4. It shall not be necessary before serving the writ, or notice of the writ, to apply to the Court or Judge to allow the service; but in case proof is given to the satisfaction of the Court or Judge that the service was duly made and that the case was a proper one for service out of the Province under the preceding rules, the service shall be allowed.

See R. S. O., c. 50, ss. 49, 51.

As to necessity of obtaining an order for leave to issue a writ for service out of the jurisdiction, see notes to O. VII., r. 1 (d).

#### 49.

5. Notice in lieu of service shall be given in the manner in which writs of summons are served.

See R. S. O., c. 50, s. 50.

As to service of writs, see prior rules of this order.

## ORDER VIII.

## APPEARANCE, &amp;C.

## 50.

O. VIII.  
R. 1.

1. All proceedings to final judgment in actions shall be carried on in the office from which the writ of summons was issued, except where by any Rule of Court it may be otherwise provided, or where a Court or Judge shall otherwise direct.

See Imp. Act of 1873, s. 64; Eng. R. Sup. C., O. 12, rr. 1-5; Eng. R. Sup. C., June, 1876, r. 12; G. O. Chy., No. 35, R. S. O., c. 50, ss. 12, 303.

This rule corresponds to the Common Law Procedure Act, R. S. O., c. 50, s. 12. In Chancery all pleadings in any cause must be filed at the same office.

Where a bill is filed with the Clerk of Records and Writs all orders of course in the progress of the cause are to be issued by him; and where it is filed with a Deputy Registrar, all orders which can be issued by such Deputy Registrar, are to be issued by him, G. O. Chy. 595.

## 51.

2. A defendant shall enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

See Eng. R. Sup. C., O. XII. r. 5; R. S. O., c. 50, ss. 61, 62; Eng. R. Sup. C., Feb., 1876, r. 5; R. Eng. Sup. C., April, 1880, r. 6.

For forms of appearance see Form 77, *et seq.*

The name of the solicitor must be given, *Warren v. Love*, 7 Doul. P. C. 602. A defendant cannot appear by more than one attorney, *Williams v. Williams*, 10 M. & W. 178; but see now *Waldon v. Thompson*, L. R. 6 Eq. 7.

If defendant is sued by a wrong name he should appear by his right name, *Lomax v. Kilpin*, 4 D. & L. 295; stating that he is sued by the wrong name, *Hobson v. Wadsworth*, 8 Doul. P. C. 601. If the defendant appear by the wrong name the plaintiff may also declare against him by that name, see *Clark v. Baker*, 13 East, 273; *Stroud v. Gerrard*, 1 Salk. 8; *Williams v. Bryant*, 5 M. & W. 447.

Where several defendants represent one interest—not merely are in the same interest—they should appear by the same solicitor, and if they sever in their defence will be allowed but one set of costs. This rule applies to trustees and *cestui que trust*, *Farr v. Sheriffe*, 4 Hare 528; *Gaunt v. Taylor*, 2 Beav. 346; *Course v. Humphrey*, 26 Beav. 402; *Prince v. Hine*, 27 Beav. 345; *Attorney-General v. Wyville*, 28 Beav. 464; *Hodson v. Cash*, 1 Jur. N. S. 864; *Heinrich v. Sutton*, L. R. 6 Ch. app. 220. One trustee, however, may have a separate interest from the other, as if he claims that the liability sought to be imposed rests upon his co-trustee, and in such case the costs may be given wholly to him, *Webb v. Webb*, 16 Sim. 55; and see *Course v. Humphrey*, 26 Beav. 402. The rule also applies to mortgagor and mortgagee, *Remnant v. Hood*, 27 Beav. 74.

See as to costs of various creditors and shareholders in the cases of winding-up companies in which there may be an analogy to an administration suit, *re Humber Iron Works*, L. R. 2 Eq. 15; *re European Banking Co.*, 16. 521; *re Anglo-Egyptian Navigation Co.*, L. R. 8, Eq. 660.

52.

3. The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business. **O. VIII. B. 3.**

See Eng. R. Sup. C., O. XII., r. 7.

53.

4. A defendant appearing in person shall state in such memorandum his address; and if he resides more than 2 miles from the office from which the writ of summons was issued, he shall state in such memorandum a place to be called his address for service, which shall not be more than 2 miles from such office.

See Eng. R. Sup. C., O. XII., r. 8; R. S. O., c. 50, s. 61.

54.

5. If the memorandum does not contain the address of the solicitor or the defendant (as the case may be) as required by the preceding rules, the memorandum shall not be received; and if such address shall be illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff; and the plaintiff may be permitted, by the Court or a Judge, to proceed by posting up the proceedings in the office from whence the writ was issued.

See Eng. R. Sup. C., O. XII., r. 9; R. S. O., c. 50, s. 61.

55.

6. The Memorandum of Appearance may be in the Form No. 77, Appendix (E), with such variations as the circumstances of the case may require.

See Eng. R. Sup. C., O. XII., r. 10; R. S. O., c. 50, s. 62. An appearance is now something more than it formerly was. Under O. XV., r. 2, the defendant may, in his appearance, state that he does not require the delivery of a statement of claim. Under O. VIII., r. 19, the defendant may limit his defence to a portion of the amount claimed by the plaintiff.

(a) In case a defendant does not require the plaintiff to deliver a statement of claim he shall so state in his memorandum of appearance, and in that case shall serve a copy of such appearance on the plaintiff.

See Eng. R. Sup. C., April, 1880, r. 6. See note to preceding rule.

O. VIII.  
7.

7. Upon receipt of a Memorandum of Appearance, the officer shall forthwith enter the appearance in the Procedure Book.

See Eng. R. Sup. C., O. XII., r. 11; Rules T. T., 1856, No. 1 (Ont.).

As to Procedure Book and the mode in which it is to be kept, see O. III., r. 16.

### 57.

8. Where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

See Eng. R. Sup. C., O. XII., r. 12.

See all the rules relating to partners as parties to actions in notes to O. IV., r. 2 (b).

### 58.

9. Where any person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

See Eng. R. Sup. C., June, 1876, r. 6.

See all the rules relating to partners as parties to actions in notes to O. IV., r. 2 (b).

### 59.

10. If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

See Eng. R. Sup. C., O. XII, r. 13; Rules of Trin. Term, 1856, No. 2, Ont.

### 60.

11. A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

See Eng. R. Sup. C., O. XII. r. 14; Rules of Trin. Term, 1856, No. 3, Ont.; Rules of H. T. 1853, No. 3, Eng.

*Undertaking.*—See notes to O. VI., r. 1.

*Attachment.*—Before moving for an attachment, request should be made of the attorney to enter the appearance, *Jacobs v. Magnay*, 7 Jur., 326.



61.

12. A defendant may appear at any time before judgment. **G. VIII.**  
If he appear at any time after the time limited for appearance **R. 19.**  
he shall, on the same day, give notice thereof to the plaintiff's  
solicitor, or to the plaintiff himself if he sues in person, and he  
shall not, unless the Court or a Judge otherwise orders, be en-  
titled to any further time for delivering his defence, or for any  
other purpose, than if he had appeared according to the writ;  
and if the defendant appears after the time appointed by the  
writ, and omits to give such notice of his appearance, the  
plaintiff may proceed as in case of non-appearance.

See Eng. Sup. C., O. XII., r. 15; R. S. O., c. 50, s. 50.

An appearance filed while the plaintiff is signing judgment is in time, though  
plaintiff affect to disregard it, *Harris v. Andrews*, 3 U. C. L. J. 31.

In Chancery where a party or solicitor causes an answer, demurrer or replication  
to be filed, he is to give notice thereof, on the same day, to the solicitor of the adverse  
party, or to the adverse party himself, if he acts in person, G. O. Chy. 46. The omis-  
sion to serve the notice does not entitle the opposite party to treat the pleading as  
a nullity or as irregular, *Smith v. Muirhead*, 2 Gr. 395. Where a defendant's solicitor  
files an answer but neglects to give notice as required by G. O. Chy. 46, the  
Court will not order it to be taken off the files, but will extend to the plaintiff the  
time for taking the next step in the cause, by such time as has been lost by the  
neglect in giving notice, *Parker v. Brown*, 3 Ch. Ch. R. 354; *Wright v. Angle*, 6  
Ha. 107; *Lloyd v. Solicitors' Life Assurance Co.*, 3 W. R. 640.

For form of notice of entry of appearance, see Forms, No. 13.

62.

13. Any person not named as a defendant in the writ of  
summons for the recovery of land, may, without leave, appear  
and defend, by filing with his appearance an affidavit stating  
that he is in possession of the land either by himself or his  
tenant (as the case may be), and stating further, in case the  
possession is by his tenant, that the defendant named in the  
writ is his tenant. The affidavit may be in the form of affi-  
davit numbered 33, in appendix C.

63.

14. Where such affidavit is not filed, any person not  
named as a defendant in a writ of summons for the recovery  
of land, may, by leave of the Court or Judge, appear and defend,  
on filing an affidavit shewing that he is in possession of the  
land, either by himself or his tenant.

See Eng. R. Sup. C., O. XII., r. 18; R. S. O., c. 51, s. 10; Eng. C. L. P. Act  
of 1862, s. 172.

Comment upon this and the preceding rule is reserved until they have received  
the light of judicial consideration.



## 64.

O. VIII.  
R. 15.

15. Any person appearing to defend an action for the recovery of land as landlord in respect of property whereof he is in possession in person or by his tenant, shall state in his appearance that he appears as landlord.

See Eng. R. Sup. C., O. XII., r. 19; R. S. O., c. 51, s. 12.

## 65.

16. Where a person not named as defendant in a writ of summons for the recovery of land enters an appearance according to either of the foregoing Rules, the appearance shall be entitled in the action against the party or parties named in the writ as defendant or defendants; and the person so entering an appearance shall forthwith give notice thereof to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action; and if such person appears and omits to give notice of his appearance, the plaintiff may proceed as in case of non-appearance.

See Eng. R. Sup. C., O. XII., r. 20; Rules of T. T. 1856, No. 93, Ont.

Under this rule notice of entering the appearance is to be given "forthwith." In the case of an appearance under rule 12 of this order it has to be given "on the same day."

*Proceed as in case of non-appearance.*—See O. IX., r. 8.

## 66.

17. Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance; or in a notice intituled in the cause and signed by him or his solicitor, such notice to be served within 4 days after appearance upon the solicitor whose name is indorsed on the writ, if any; and if none, then filed in the proper office; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

This is a provision similar to Ejectment Act, R. S. O., c. 51, s. 13.

Where a defendant in express terms defended for "part of lot, etc., mentioned in the writ," he was not allowed at the trial to contend that what he defended for was not part of lot, etc., and not on that account the property of the plaintiff, *Darling v. Wallace*, 9 U. C. R., 611.

Want of reasonable certainty is ground for an application for better particulars, *Watson v. Brewer*, 4 Pr. R. 202.

When a defendant files his appearance in an action of ejectment, the cause is at issue, and the plaintiff may serve issue book and notice of trial. Defendant may,

however  
under  
issue bo  
have th

See  
Winter

For  
Forms,  
Plai

r. 8.  
With

18.  
ding  
with

See

19.  
cases  
which  
pearan  
that h  
he ne  
puting  
defenc  
claim.  
in the  
tions

In t  
ant insi  
ant insi  
\$  
more,"

This  
gage su  
plaintif  
the amo  
to four  
indorse  
388. I  
opinion  
defend  
says, "  
both, a  
which f  
allowed  
it was  
amoun  
usury,  
merely  
proper

however, within four days, give notice limiting the defence; and, if he do, may under the powers of amendment in the Administration of Justice Act, have the issue book amended in accordance with the limitation, but he is not entitled to have the notice of trial set aside, *Casy v. McGrath*, 6 Pr. R. 274. **O. VIII. R. 17.**

See the prior cases, *Grimshaw v. White*, 12 U. C. C. P. 521; *Phillips v. Winters*, 3 Pr. R. 312; *Buchanan v. Bettes*, 2 U. C. L. J. N. S. 71.

*Form of appearance limiting defence.*—See Forms, No. 78. Form of notice. Forms, No. 14.

*Plaintiff's right to sign judgment* for portion not included in defence, see O. IX., r. 8.

*Within four days.*—See O. LII. as to computation of time.

## 67.

18. The notice to be served as mentioned in the last preceding Rule may be in the Form No. 14 in Appendix (B) hereto, with such variations as circumstances may require.

See Eng. R. Sup. C., O. XII., r. 22.

## 68.

19. Any person appearing to a writ of summons in other cases may limit his defence to the question of the amount to which the plaintiff is entitled, and in that case may in his appearance, or by notice served within 4 days thereafter, state that he disputes only the amount claimed by the plaintiff; and he need not file any further defence for the purpose of disputing such amount; and the plaintiff is to proceed as if the defendant had filed a defence disputing the amount of the claim. The notice disputing the amount of the claim may be in the Form No. 15, in Appendix (B) hereto, with such variations as circumstances may require.

In this case, to the ordinary appearance should be added the words, "The defendant insists that the amount due to the plaintiff is \$ only," or "the defendant insists that the amount due to the plaintiff is \$ for principal and \$ for interest since the day of , etc., and no more," or as the case may be. See Form No. 77.

This clause appears to be partially based upon the Chancery practice in mortgage suits in which, in case the defendant disputed the amount claimed by the plaintiff, he need not answer, but might file a disputing note as follows: "I dispute the amount claimed by the plaintiff in this cause," and he was thereupon entitled to four days' notice of the time appointed for settling the amount. See form of indorsement of a bill in Schedule S., G. O. Chy., Taylor's Cons. Chy. Orders, p. 388. In *Cattanach v. Urquhart*, 6 Pr. R. 28, Blake, V. C., said:—"I am of opinion that it is necessary to plead the Statute of Limitations in order that the defendant may obtain the benefit of it. The 546th General Order of the Court says, 'All defences are to be presented to the Court by demurrer or answer, or both, according to circumstances.' Here the defendant proposes to raise that which is a complete defence to the whole of the plaintiff's claim, and which, if allowed as a defence, would shew them not intitled to any decree. I do not think it was intended under the disputing note, which says merely, 'I dispute the amount claimed by the plaintiff in this cause' to allow such defences as that of usury, of the Statute of Limitations, or the like to be raised. This notice points merely to some error in the account of the plaintiff, and to an intention at the proper time of disputing and resisting the claim as made. The authorities seem to

**O. VIII.  
R. 19.**

shew clearly that such a defence as the present must be raised by answer, and that when this has not been done, and the plaintiff obtains a decree for account, the defendant cannot thereafter raise any questions save those of account; at least that he cannot raise after decree a defence which could be raised properly by answer, and which when established defeats *in toto* the plaintiff's right to a decree. Questions of account are properly postponed to the Master's office, but I take it that where a bill is allowed to go *pro confesso*, and the defendant simply files a disputing note, he must be deemed to have admitted sufficient to entitle the plaintiff to a decree, and reserved to himself merely the right to reduce the amount of the plaintiff's claim. See *Penn v. Lockwood*, 1 Gr. 547; *Proudfoot v. Bush*, 7 Gr., 518; *Darby on Stats. of Limitations* 439, 2 Dan. Pr. 1099.

In *Wright v. Morgan*, 24 Gr. 457, the defendant filed a disputing note and on taking the account objected to the allowance of more than six years' arrears of interest. The Master gave effect to the objection. On appeal this decision was reversed, but the Court of Appeal (1 App. R. 613) upheld the Master, Burton, J. A., saying:—"If the principal and interest secured by the mortgage had been barred by the Statute of Limitations, and the defendant had disputed the right of the Court to make a decree against him at all, he must have raised that question by answer, and the issue so raised would have been determined by the Court, rendering any reference unnecessary in the event of the issue being found in favour of the defendant. But in a case like the present where the defendant has no disposition to dispute the facts set forth in the bill, but, admitting the validity of the mortgage, disputes only the existence of a portion of the interest as a charge upon the land, what issue could he raise by answer for the decision of the Court? Whether more or less is due upon the security is no answer to the prayer of the plaintiff's bill, and the Court would take no evidence upon it, but would pronounce precisely the same decree as was made here, referring it to the Master to find how much was due for principal and interest on the mortgage security."

*Proceed as if the defendant had filed a defence disputing the amount of the claim.*—The practice in Chancery in mortgage cases was to obtain a decree upon præcipe notifying the defendant to attend at the taking of the accounts, either upon the settlement of the decree or in the Master's office as the case might be. That practice is, of course, inapplicable. Under O. XVII. r. 1 (a), if the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within three months from the time of the defendant's entering his appearance, and under O. XXV. if the defendant does not deliver his defence the plaintiff may enter final judgment. The rule says then that the plaintiff is to proceed as if the defendant had filed a defence. In mortgage cases, however, decrees on præcipe may yet be obtained under O. IX., r. 10.

## ORDER IX.

### DEFAULT OF APPEARANCE.

#### 69.

**O. IX.  
R. 1.**

1. Where no appearance has been entered to a writ of summons for a defendant who is a person of unsound mind not so found by inquisition, or judicial declaration in lieu of an inquisition, the plaintiff may apply to the Court or a Judge for an order that the official guardian or some other proper person be assigned guardian of such defendant, by whom he may appear and defend the action.

(a) But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly

serve  
tion  
days  
plica  
son w  
time

See  
a. 65.

In  
it must  
sall, 1  
alleged  
eviden  
mind,  
may ju  
be she  
lunatic  
quest d  
their g  
ad liti  
Ch. 21

"D

"C

"O

"S

2.

with  
serve  
point  
expir  
notic  
of su  
guar  
wise  
tivel  
purp  
fathe  
whom  
is no  
make  
inter

See

"C  
which  
infant  
session  
made  
plaint  
"

served, and that notice of the application was, after the expiration of the time allowed for appearance, and at least 6 clear days before the day in the notice named for hearing the application, served upon, or left at the dwelling-house of, the person with whom or under whose care such defendant was at the time of serving such writ of summons.

See Eng. R. Sup. C., O. 13, r. 1; G. O. Chy., Nos. 519, 520; R. S. O., c. 40, s. 65.

In moving to have a guardian *ad litem*, appointed to a person of unsound mind, it must be shewn that he has not been so found by inquisition, *Crawford v. Bird-sall*, 1 Ch. Ch. 70. On an application to appoint a guardian *ad litem*, to a person alleged to be of unsound mind, not so found by inquisition, it is not sufficient evidence of the fact of lunacy, that deponents swear that the person is of unsound mind, or that they believe him to be so; such facts should be shewn that the Court may judge for itself whether the person is of unsound mind or not. It must also be shewn that the proposed guardian has no interest conflicting with that of the lunatic, *McIntyre v. Kingsley*, 1 Ch. Ch. 281. The Court will not, even at the request of the infant defendants in an amicable suit, appoint the plaintiff's solicitor their guardian *ad litem*, *James v. Robertson*, 1 Ch. Ch. 197. Where a guardian *ad litem* dies a new one may be appointed without notice, *Harper v. Harper*, 1 Ch. Ch. 217.

"Duly served."—As to service upon lunatic, see O. VI., r. 6.

"Court or Judge."—See notes to O. IV. r. 1 (a).

"Official Guardian."—See sec. 66 of the Act.

"Six clear days."—As to computation of time see O. LII.

## 70.

2. In case of an infant defendant, who has been served with a writ of summons, otherwise than by the same being served on the official guardian, if no guardian *ad litem* is appointed within 7 days after the time for appearance had expired, the plaintiff may serve the official guardian with notice of the said particulars; whereupon from the time of such service the official guardian shall become and be the guardian *ad litem* of the infant, unless and until the Court otherwise orders; and it shall be his duty forthwith to attend actively to the interests of the infant in the action, and for that purpose to communicate with all proper parties, including the father or guardian (if any) of the infant, and also the person with whom or under whose care the infant resides, in case such person is not the infant's father or guardian; and the guardian is to make such other inquiries and take such other proceedings as the interests of the infant may require.

See G. O. Chy. 610, 611.

"Otherwise than by the same being served on the official guardian."—The cases to which these words apply seem to be actions for the recovery of money from an infant personally, or of lands, goods, or chattels, of which he is personally in possession, see O. VI., r. 4. In such cases it is presumed that an application may be made by any person asking to be appointed guardian, and in default then the plaintiff may proceed by serving the official guardian.

"Within seven days."—As to computation of time, see O. LII.

## 71.

O. IX.  
R. 3.

3. Where any defendant fails to appear to a writ of summons and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order 11, Rule 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, or the undertaking of the defendant's solicitor accepting service and agreeing to enter an appearance, with an affidavit verifying the undertaking filed, as the case may be.

See Eng. R. Sup. C., O. XIII., r. 2.

"*Or the undertaking, etc.*"—These words are not in the English Act, and the procedure under it is to apply for an attachment against the solicitor. That practice is available under the present rules, see O. VIII. r. 11, and see notes to O. VI. r. 1.

"*Order II. r. 1.*"—This refers to cases of ordinary account, when the plaintiff desiring an account to be taken, has indorsed his writ of summons to that effect, as provided by Ord. III. r. 6. The plaintiff may without special leave, serve notice of motion or other notice, petition, or summons, upon any defendant, duly served with a writ, who has not appeared within the time limited, O. XLVII. r. 7.

"*An affidavit verifying.*"—Under the Chancery practice it was not necessary to verify the signature of the solicitor; see as to this, notes to O. VI. r. 1.

## 72.

4. In case of non-appearance by the defendant where the writ of summons is specially indorsed under Order 3, Rule 4 the plaintiff may sign final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, and the plaintiff may, at the expiration of 8 days from the last day for appearance, and not before, issue execution upon such judgment; but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

See Eng. R. Sup. C., O. XIII., r. 3; R. S. O., c. 50, s. 64; Eng. C. L. P. Act of 1852, s. 27.

"*Non-appearance.*"—If there is an appearance proceedings may be taken under O. X.

"*Specially indorsed.*"—See notes to O. III., r. 4.

If the writ be not specially indorsed, but the case is one in which it might have been so, the judgment is signed under O. IX., r. 6. The only distinction in the forms of the judgments is that under r. 4 the costs are fixed by the judgment—"a sum for costs," whereas under r. 6 the judgment is for "costs to be taxed," see the forms Nos. 148 and 147.

"*Eight days.*"—As to computation of time see O. LII.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*To set aside.*"—See also O. XXV., r. 12.

For cases in which a judgment will be set aside and upon what terms, see Robinson v. Joseph's Digest, 1931 *et seq.*

5.  
indorsed  
Order  
writ of  
final  
issue  
right

See  
of 1852,  
This  
O., c. 50  
against  
have ab

6. V.  
mons  
claim  
claim  
affidav  
as the  
ticular  
the in  
of 8 d  
by, an  
be mo

See  
of 1852,

"*Spe*

"*Full*  
in r. 3 o  
been ins

"*Full*  
appears  
wards b  
lars of h

"*Co*

As to

For

(a)

costs o

the ta

specia

and se

This

reasona

73.

5. Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money under Order 3, Rule 4, and one or more of the defendants appear to the writ and others of them do not appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment, without prejudice to his right to proceed with his action against such as have appeared.

See Eng. R. Sup. C., O. XIII., r. 4; R. S. O., c. 50, s. 69; Eng. C. L. P. Act of 1852, s. 33.

This is a variation of the provision in the Common Law Procedure Act, R. S. O., c. 50, s. 69; by which, if the plaintiff issued execution upon the judgment signed against one or more of the defendants who did not appear, he was to be taken to have abandoned his action against the defendant or defendants who did appear.

74.

6. Where the defendant fails to appear to the writ of summons and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need afterwards be delivered, but the plaintiff may file an affidavit of service of the summons, or of notice in lieu of service, as the case may be, and file and serve a statement of the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and may, after the expiration of 8 days, enter final judgment for the amount shewn thereby, and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ, besides costs.

See Eng. R. Sup. C., O. XIII., r. 5; R. S. O., c. 50, s. 65; Eng. C. L. P. Act of 1852, s. 28.

"*Specially indorsed.*"—This means under O. III., r. 5.

"*File an affidavit of service.*"—The words "or the undertaking, etc.," which have in r. 3 of this Order, been added to the corresponding English rule, should have been inserted here also. Their omission leaves a conflict between the two rules.

"*File and serve.*"—The English rule requires filing only. The present rule appears to be inconsistent. It provides that "no statement of claim need afterwards be delivered," but requires the plaintiff to serve "a statement of the particulars of his claim."

"*Costs to be taxed.*"—See notes to rule 3 of this Order.

As to setting aside judgments, see O. XXV., r. 12.

For form of judgment see Form No. 147.

(a) In such case the plaintiff is not to be entitled to the costs of the statements of the particulars of his claim, unless the taxing officer is notified that there was good reason for not specially indorsing the writ, so as to render unnecessary filing and serving such statements.

This provision is taken from R. S. O. c. 50, s. 66, and the intended meaning is reasonably apparent.



## 75.

O. IX.  
R. 7.

7. Where the defendant fails to appear to the writ of summons and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons shall be assessed as hitherto, or at the County Court of the County in which the action is brought if the solicitors for all parties reside in such County; or the High Court or a Judge thereof, may order that the value and amount of damages, or either of them, shall be ascertained in any other way in which any question arising in an action may be tried.

See Eng. R. Sup. C., O. XIII., r. 6; R. S. O. c., 50, s. 152; Eng. C. L. P. Act of 1852, ss. 28, 94.

This rule applies to cases (1) for the detention of goods, and (2) of pecuniary damages.

For form of interlocutory judgment, see Forms, No. 152. For judgment after assessment of damages, see Forms, No. 154.

"Assessed as hitherto." R. S. O., c. 50, s. 152, is as follows:—No writ of inquiry shall issue to a sheriff in cases of judgment by default, but, except in cases where the judgment is final as aforesaid, the damages when to be assessed by a Judge, or jury shall be ascertained at the same time, and in like manner as if the parties had pleaded to issue, and the entries shall be made on the roll accordingly.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Any other way."—Under O. XXIX., r. 1, the Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

See also sec. 63 of the Act and O. XXXI., r. 23.

## 76.

8. In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

See Eng. C., O. XIII., r. 7; R. S. O. c. 51, s. 20; Eng. C. L. P. Act of 1852, s. 177.

"Defence be limited."—As to limiting defence, see O. VIII. r. 17 and notes, and Forms, Nos. 14, 78.

The judgment can only be for recovery of possession of the land, and not for costs, *White v. Cochlin*, 2 Fr. R. 249; *Haskins v. Cannon*, *Id.* 334; *Bleecker v. Campbell*, 4 U. C. L. J. 136. But the costs may be recovered in an action for mesne profits, *Smith v. Tett*, 9 Ex. 307; and see now as to costs in case of default in appearance, R. S. O. c. 51, s. 20, s.-s. 2.

9. arrears for the proceeds in the claim

See of 1856

No an action in breach O. XII

If the proceeds

"A trial of his attack cause (not) per or any mesne expira of the therein given the profits before mesne for the so special recover

10. plain action plain the Dep such as pery

And

And

And



77.

9. Where the plaintiff has indorsed a claim for mesne profits, <sup>O. IX.</sup> arrears of rent, or damages for breach of contract, upon a writ <sup>R. 9.</sup> for the recovery of land, he may enter judgment as in the last preceding Rule mentioned, for the land; and may proceed as in the other preceding Rules of this order, as to such other claim so indorsed.

See Eng. R. Sup. C., O. XIII., r. 8; R. S. O., c. 51, s. 70; Eng. C. L. P. Act of 1856, s. 257.

No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except in respect of mesne profits, or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are or is held, O. XIII., r. 2.

If the defendant after appearance makes default in pleading, the plaintiff may proceed under O. XXV. r. 8.

"*Mesne Profits*."—R. S. O., c. 51, s. 70, enacts that wherever it appears on the trial of an ejectment at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of trial, the Judge before whom the cause comes on to be tried, shall (whether the defendant appears upon the trial or not) permit the plaintiff, after proof of his right, to recover possession of the whole or any part of the premises mentioned in the writ, to go into evidence of the mesne profits thereof which have, or might have, accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and if on the trial a verdict is found for the plaintiff, the same shall be given upon the whole matter both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession of costs, but also for the mesne profits so found; and the landlord may, after the verdict, bring an action for the mesne profits which accrue from the time of the verdict, or from the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment.

78.

10. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure or sale or redemption, or where the action is for the administration of an estate, or for a partition, the plaintiff shall be entitled to a judgment or order on *præcipe* to the Registrar, Deputy-Registrar, Local Registrar, or Clerk or Deputy-Clerk of the Crown and Pleas, as the case may be, on such evidence (if any) and in such cases (as nearly as may be), as provided for by the present practice of the Court of Chancery in that behalf.

As to mortgage suits, see G. O. Chy. 426 *et seq.*, 645 *et seq.*, *post*.

As to administration suits, see G. O. Chy. 467 *et seq.*, 638 *et seq.*, *post*.

As to partition suits see, G. O. Chy. 638 *et seq.*, *post*.

## 79.

G. IX.  
H. 11.

11. Where the action is for the foreclosure or redemption of a mortgage, or sale of mortgaged premises, if the plaintiff is not entitled to a judgment or order on *proceipe*, or would not according to the practice of the Court of Chancery be entitled on *proceipe* to such a judgment or order as he desires, he shall be entitled to the proper judgment or order, on notice or otherwise, according to the practice of the Court of Chancery where a cause is heard on an order to take the bill *pro confesso* or otherwise.

As to mortgage suits, see G. O. Chy. 426 *et seq.*, 645 *et seq.*, *post*.

## ORDER X.

LEAVE TO SIGN JUDGMENT WHERE WRIT SPECIALLY INDORSED.

## 80.

G. X.  
H. 1.

1. Where the defendant appears to a writ of summons specially indorsed, under Order 3, Rule 4, and the plaintiff is not entitled to a judgment or order, under the preceding Order, he may, on an affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, serve the defendant with a notice of motion to shew cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

See Eng. R. Sup. C., O. XIV., r. 1; Eng. R. Sup. C., May, 1877, r. 3.

*Specially indorsed.*—A writ of summons was indorsed as follows:—"The plaintiff's claim is £49 5s. 8d. The following are the particulars." It then went on "To goods," with dates and amounts, and, after giving credit for certain payments, stated the balance due to be £49 5s. 8d.:—"Held a sufficient indorsement under O. III. r. 4, to entitle plaintiff to sign judgment under this Order, and that the indorsement was not vitiated by the mention therein of a banker's draft which had been given as payment, but was dishonoured, and in respect of which no claim was made, *Smith v. Wilson*, L. R. 4 C. P. D. 392.

The  
claim  
certain  
jointly  
Held  
O. III.  
must

See  
"A  
allow  
person  
was no  
v. Van  
an ord  
ment  
not su  
to O.

W  
althou  
Rail.  
(Limit

"  
made  
As to  
The a  
applic  
mons  
be ma  
Court  
applic  
11).

M  
positi  
there  
upon  
attida  
Vand

T  
the s  
defec  
good  
sign

A  
the b  
ing t  
Cour  
Q. B.  
279.  
file a  
D. 7  
Wag  
The  
when  
seem  
in th  
exerc  
bound  
allow  
with  
veni  
said  
Wal  
davi  
fend  
othe

The writ of summons in an action was indorsed as follows:—"The plaintiff's claim is £399 9s. 7d., the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiffs were jointly liable, and which bills and notes have been taken up by the plaintiffs":—Held that this indorsement did not constitute a good "special indorsement" under O. III. r. 4, and therefore that a judgment which had been signed under this rule must be set aside, *Walker v. Hicks*, L. R. 3 Q. B. D. 8.

See also notes to O. III., r. 4.

"Any other person."—The rule differs from the original Eng. O. XIV., r. 1, in allowing the affidavit to be made not merely by the plaintiff but by "any other person who can swear positively to the debt or cause of action." In England it was necessary that the affidavit should be made by the plaintiff himself, *Frederici v. Vanderzee*, L. R. 2, C. P. D. 70. And where the plaintiffs were a corporation an order could not be obtained calling upon the defendant to shew cause why judgment should not be signed, for an affidavit from an officer of the corporation was not sufficient, *Bank of Montreal v. Cameron*, L. R. 2 Q. B. D. 536; and see notes to O. III., r. 4.

Where defendant is a corporation.—The plaintiff may apply under this rule although the defendants are a corporation, *Shelford v. The South and East Coast Rail. Co.*, L. R. 4 Ex. D. 317; *Muirhead v. The Direct United States Cable Co. (Limited)*, 27 W. R. 708.

"Notice of motion to shew cause before the Court or a Judge."—Can the motion be made before the master in Chambers, or to a County Court Judge or local Master. As to the effect of the words "Court or a Judge," see notes to O. IV., r. 1 (a). The application is to be made on notice of motion and not by summons. Now all applications to the Court or a Judge are to be by notice of motion and not by summons (O. XLVII., rr. 1 & 2), all applications to the Master in Chambers are to be made in the same way (O. XLVIII., r. 1) and "Every application to a County Court Judge or local Master under the Act or these rules shall, where notice of the application is necessary, be made in a summary way by summons" (O. XLIX., r. 11). The authors are unable to do more than merely call attention to these rules.

Material for application.—The affidavit must be, (1) of some one who can swear positively; (2) it must verify the cause of action; and (3) state that in his belief there is no defence to the action. An application that the defendant may be called upon to shew cause why final judgment should not be signed, must be made on an affidavit that in the plaintiff's belief there is no defence to the action, *Frederici v. Vanderzee*, L. R. 2 C. P. D. 70.

The making of the affidavit required is not a condition precedent to the issue of the summons for leave to sign final judgment. So that, where the plaintiff made a defective affidavit, then obtained his summons, and afterwards swore a fresh and good affidavit, it was held that the issue of the summons was good, and leave to sign final judgment was given, *Begg v. Cooper*, 40 L. T. N. S. 29.

Answer to the Application.—If the defendant makes an affidavit and goes beyond the bare statement that he has a defence on the merits, and gives reasons for thinking that the defence is substantial, he ought not to be compelled to pay money into Court as a condition of his being let in to defend, *Runnacles v. Mesquita*, L. R. 1 Q. B. D. 416; and see remarks of Cotton, L. J., in *Ray v. Barker*, L. R. 4 Ex. D. 279. The Court or a Judge may, in their or his discretion, allow the plaintiff to file an affidavit in reply to the defendant's affidavit, *Davis v. Spence*, L. R. 1 C. P. D. 719, and *Girvin v. Grepe*, L. R. 13 Ch. D. 174; overruling *North Central Waggon Company v. North Wales Waggon Company*, 39 L. T. N. S. 628. The point again, however, came up in *Rotherham v. Priest*, 41 L. T. N. S. 558, when Grove, J., said:—"As regards the admissibility of affidavits in reply it seems to me to have been treated as a matter of discretion. It was so treated in the case of *Davis v. Spence*, where it was held that the learned Judge had exercised a sound discretion in admitting them, and not that the Court were bound to hear them in all cases. There may be cases where the Court may allow affidavits in reply to be used; but I think in deciding as we do we are acting within the authority of decided cases. The practice would lead to the very inconvenient result that we should be trying cases on affidavit alone." And Lopez, J., said:—"I agree with the decision in the *North Central Waggon Company v. North Wales Waggon Company*, though I can imagine circumstances in which an affidavit in reply might be desirable. But as a general rule the affidavit of the defendant is the last thing that should come under the notice of the Judge. If it be otherwise, he would be really trying the case on the affidavits."

O. X.  
R. 1.

*Discretion of Court.*—In *Ray v. Baker*, L. R. 4 Ex. D. 279, Bramwell, L. J., said:—"Order XIV. (Ont. O. X.) no doubt contains useful provisions; it improves the procedure very much in actions for debts, where there is really no defence; for it saves the expense attending the formality of a trial at which perhaps the defendant will not appear. Nevertheless it is a remedy which ought not to be used except where the plaintiff's case is clear: if there be any doubt as to the right to recover, he ought not to be allowed to avail himself of a process so summary in its nature. By the first rule of Order XIV. (Ont. O. X.) an order may be made empowering the plaintiff to sign judgment in an action where the writ has been specially indorsed, but this rule is to be read subject to the sixth rule, which provides that leave to defend may be given either unconditionally or upon terms." And Cotton, L. J., said:—"I think that the power conferred by Order XIV. (Ont. O. X.) ought to be used carefully, and that we ought to consider whether in the present case an order ought to have been made. If the defendant's affidavit sets up a good defence, the Court has no discretion, and cannot order the money claimed to be paid into Court. But an alternative is allowed in which leave to defend may be given, namely, where the defendant discloses 'such facts as may be deemed sufficient to entitle him to defend'; and it is this state of facts to which the discretionary power given by the sixth rule is directed. The affidavit may not make it clear that there is a defence, but the defendant may be able at the trial to establish a *bona fide* defence."

The power given to a Court or Judge to allow the plaintiff to sign final judgment under this order is intended to be exercised when it is shewn, either from the acknowledgment of the debt by the defendant or from other circumstances, that the defence would be for mere purposes of delay. In an action against a surety on a specially indorsed writ it was not shewn that the debt had been acknowledged by the principal debtor, or that particulars had been furnished to the defendant, or that he had admitted his liability, it was held that the defendant might reasonably call on the plaintiff to prove his claim, and should be allowed to defend without paying money into Court or giving security, *Lloyd's Banking Co. (Limited) v. Ogle*, L. R. 1 Ex. D. 262; see this case distinguished, *Anglo-Italian Bank v. Wells*, 38 L. T. N. S. 197. The defendant, if he make no affidavit of merits, is not entitled as a matter of right to defend the action upon offering to bring the sum into Court. A discretion is vested in the Judge to decide whether, upon considering the other facts of the case, the defendant's offer is a sufficient ground for refusing the plaintiff's application, *Crump v. Cavendish*, L. R. 5, F. D. 211.

*Oriental Bank v. Fitzgerald*, W. N. (1880) 119; 43 L. T. N. S. 80, was an action to recover a sum of £2,500. The defendant had been a customer of the plaintiffs' bank. A balance was struck in August, 1872, and the defendant had subsequently paid sums by which he recognized that balance as correct. He now disputed its correctness, but admitted that he owed the plaintiffs about £1,500. The defendant held as security a policy, the surrender value of which was between £1,400 and £1,500. A summons having been taken out under Rules of Court, 1875, Order XIV. (Ont. O. X.) a Judge at Chambers allowed the defendant to defend upon payment of £2,000 into Court. The Exchequer Division upon appeal gave leave to defend upon payment of £1,500. The defendant appealed. The Court (Bramwell, Baggallay, and Brett, L. J.J.) dismissed the appeal. And see also *Berridge v. Roberts*, W. N. (1876) 86; *Thorne v. Seel*, W. N. (1878) 215; *Thompson v. Marshall*, W. N. (1879) 213; *Harrison v. Bottenheim*, 26 W. R. 362; *Hannmer v. Flight*, 36 L. T. N. S. 279.

In a doubtful case the application might, under O. XXXVI. r. 9, be turned into a motion for judgment or the hearing of the cause.

*Appeal from Order.*—The order is an interlocutory order and appealable as such only, *Standard Discount Co. v. La Grange*, L. R. 3 C. P. D. 67. The order being discretionary will not be lightly overruled, *Papayanni v. Coutpas*, W. N. (1880) 109.

*Forms.*—For form of order allowing plaintiff to sign judgment, see Forms, No. 115.

For form of order allowing defendant to defend unconditionally, see Forms, No. 116.

For form of order allowing defendant to defend on payment into Court, see Forms, No. 117.

For form of order allowing defence as to part on payment into Court and as to residue unconditionally, see Forms, No. 118.

F.  
F.  
condi  
Fo  
money

2.  
ment  
return

See  
"O  
"T

3.  
by of  
or by  
defen  
if so,  
may,  
amine  
copies

See  
See  
If a  
by whic  
the fina  
upon en  
judgme  
v. Beat

4.  
defenc  
any p  
have j  
does n  
terms,  
any a  
sheriff  
think  
the res

See  
18

For form of judgment under an order made under this rule, see Forms, No. 153. **O. X.**

For form of judgment where leave had been given to sign judgment unless some condition should be complied with, see Forms, No. 161. **R. 1.**

For form of judgment where leave had been given to sign judgment unless money paid into Court, see Forms, No. 162.

### 81.

2. The application by the plaintiff for leave to enter judgment under the last preceding Rule shall be made on notice returnable not less than 2 clear days after service.

See Eng. R. Sup. C., O. XIV., r. 2.

"On notice."—The affidavit must accompany the notice. See preceding rule.

"Two clear days."—As to computation of time, see O. LII.

### 82.

3. The defendant may shew cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the Judge may, if he thinks fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom.

See Eng. R. Sup. C., O. XIV., r. 3.

See notes to rule 1 of this Order.

If a defendant fulfilling the condition of one Order under rule 1 of the Order by which he was allowed to defend an action, has brought money into Court, and the final judgment of a Divisional Court be afterwards entered for him, he is thereupon entitled to the return of the money, although notice of appeal against the judgment may have been given by the plaintiff, *Yorkshire Banking Co. (Limited) v. Beaton & Mycock*, L. R. 4 C. P. D. 213.

### 83.

4. In any case if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

See Eng. Sup. C., O. XIV. r. 4.

**O. X.****R. 4.**

When upon shewing cause against an application for leave to sign final judgment, the defendant's affidavit admits part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power under this rule to require the defendant to pay to the plaintiff the amount admitted to be due, as a condition of being allowed to defend as to the residue. The proper order is that the plaintiff have judgment for the amount admitted, the defendant to be at liberty to defend as to the residue, *Dennis v. Seymour*, L. R. 4 Ex. D. 80.

For Form of order giving leave to defend as to part on payment into Court, and as to residue unconditionally, see Forms No. 118.

**84.**

5. If it appears to the Judge that any defendant has a good defence to the action, or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

See Eng. R. Sup. C., O. X., r. 5.

"Good defence."—See notes to O. X., r. 1.

"Execution, etc."—See similar words in O. IX., r. 5; and see as to meaning of "execution," O. XXXVIII., r. 6.

**85.**

6. Leave to defend may be given unconditionally, or subject to such terms as to giving security, or otherwise, as the Court or a Judge may think fit.

See Eng. R. Sup. C., O. XIV., r. 3; see notes to preceding rules.

**ORDER XI.**

**APPLICATION FOR ACCOUNT, &C., WHERE WRIT INDORSED UNDER ORDER III., RULE 6.**

**86.****O. XI.****R. 1.**

1. In default of appearance to a writ indorsed under Order 3, Rule 6, and after appearance in a case in which the preceding Orders do not entitle the plaintiff to a judgment or order on præcipe or otherwise, then unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made.



See Eng. R. Sup. C., O. XV., r. 1; G. O. Chy., No. 457, *et seq.*; R. S. O., c. 50, **O. XI** ss. 189-197; Imp. Act, 15 & 16 Vic., c. 86, ss. 45, 47. **R. 1.**

"*Indorsed under O. III., r. 7.*"—In all cases of ordinary account, as, for instance, in the case of partnership, or executorship, or ordinary trust account, where the plaintiff desires to have an account taken in the first instance, the writ of summons shall be indorsed with a claim that such account be taken, O. III. r. 7.

*Form of order.*—Where an order for preliminary accounts is obtained under this rule, after issuing the writ of summons in a foreclosure action, and after simple appearance to the writ by the defendant, the order should not prejudice the trial of any issues which might be raised by the pleadings subsequently delivered, by inserting, as of common form, the words, "and the Judge not requiring any trial of the action other than this application," *Gath v. Webster*, L. R. 12 Ch. D. 771.

"*Default of appearance.*"—In case an appearance has been entered a decree might be obtained under O. XXXVI. r. 10.

"*Judgment or order on præcipe.*"—See O. IX. r. 10.

"*By affidavit.*"—It is said that the corresponding English rule authorizes the use of affidavits to prove any matter required on further directions as to costs, *Beavey v. Elliott*, W. N. (1880) 99.

"*Court or a Judge.*"—See notes to O. IV. r. 1 (a).

"*With all directions now usual.*"—(1) *Partnership.* The usual decree in cases of partnership merely directs one of the Masters to take the accounts and ascertain the credits, property and effects outstanding, and reserves further directions and costs, *Seton* on Dec. (4th ed.) 1199. (2) *Executorship account.* See G. O. Chy. 467, *et seq. post.*

## 87.

2. An application for such order as mentioned in the last preceding Rule shall be made on notice, and be supported by an affidavit filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

See Eng. R. Sup. C., O. XV., r. 2.

"*On notice.*"—Before whom? See notes to O. X. r. 1.

## 88.

3. But the preceding 2 rules are not to prevent orders for the administration of the estate real or personal of a deceased person, or for the partition or sale of an estate from being obtained on motion without any previous notice or other preliminary proceeding, and in the manner provided for by the General Orders of the Court of Chancery in that behalf.

See G. O. Chy. 467, *et seq. post.*



## ORDER XII.

## PARTIES.

## 89.

O. XII.  
R. 1

1. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And, without any amendment, judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.

See Eng. R. Sup. C., O. XVI., r. 1; R. S. O., c. 49, s. 5.

This is an important innovation on former practice, and is a material extension of the previous practice, either in the Courts of Law or Equity.

The principles upon which the Courts have heretofore acted (irrespective of the Ad. of Jus. Act, R. S. O., c. 49) are well stated in Wilson's Judicature Acts, at pages 173, 174: "Subject to a few exceptions, the Common Law Courts were rigidly tied down to disposing of claims arising between exactly the same parties upon each side, and in the same rights. They could give a judgment for A against C, or against C, D and E, but they could not give relief of one sort against C, and of another sort against D and E; nor could they give relief of one kind to A, and of another kind to B, or of one kind to A and B jointly, and another to A separately. All the plaintiffs, if more than one, had to be jointly entitled, and all the defendants jointly liable, with respect to every single matter upon which the Court was asked to adjudicate. In Chancery, on the other hand, the course was to deal with the controversy or transaction forming the subject matter of the action as a whole, and endeavour to do complete justice with respect to it; and for that object the Court insisted on all the parties interested in the subject matter being brought before it. The extreme strictness of this rule has been usefully relaxed from time to time in ways which, at this point, it is not necessary to specify, but in the main it has not been departed from. The result has been that a Court of Law could not handle the matter as a whole, however desirable it might be to do so; but was obliged to confine itself to the specific claim of one person against another. A Court of Equity could only deal with the matter as a whole, whether that were really necessary or not, and could not dispose of the mutual rights of particular persons singly, however convenient it might be to do so.

Rules 1 and 3 of this Order may be considered together. By the latter "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative." Observe the words (1) jointly, (2) severally, (3) alternative.

(1) *Jointly*.—Plaintiffs jointly interested could formerly unite in bringing an action against defendants jointly liable.

(2) *Severally*.—Does this word permit two plaintiffs who have distinct and different causes of action against the same defendant, or various defendants, to unite them all in one action? In *Booth v. Briscoe*, L. R. 2 Q. B. D. 496, the plaintiffs were trustees of a charity, and conceiving that language published by the defendant was libellous as against them, united in bringing one action for damages. Prior to the Judicature Act this could not have been done, and in discussing the effect of the Act, Bramwell, L. J., said:—"The only remaining matter was a doubt I had suggested, whether these eight plaintiffs, if they had any cause of action, had not

eight  
am st  
broug  
differ  
done t  
a join  
injure  
for the  
if then  
prior t  
seems  
join as  
must c  
join."

It n  
of the s  
quoted,  
not onl  
he unde  
Pleadin  
follows  
For if e  
eight se  
can, un  
number  
M for b  
and so  
question  
you hav  
who are  
any def  
ject mat  
mitted s  
Booth v  
requires  
the actio  
to be tal  
terested,  
ter" was  
intereste  
L. R. 4

Prin  
authorit  
Hondur  
301, was  
L, thro  
to take  
L had  
make th  
or for d  
authorit  
It was  
plaintiff  
"ace, a  
ained.  
given un  
was held  
was prop

Lesso  
Stenning  
lessee of  
W. a pa  
and pray  
plaintiff  
The plai

eight separate causes of action, and whether they could be joined as plaintiffs. I O. XII. am still of opinion that they had eight causes of action, and that they might have brought eight actions; and the question is whether under the Judicature Act any difference has been made so that they can bring one action. Where a tort has been done the tort is a separate tort to each man who complains. If, indeed, there were a joint tort, for instance slander of several persons in partnership, the persons injured could have joined and maintained the action, but could have maintained it for the joint damage only. Here there is no joint damage. Each of the plaintiffs, if there is a libel, has been separately libelled. There is no doubt, therefore, that prior to the Judicature Act this proceeding would have been erroneous; but it seems to us that under Order XVI., r. 1, (Ont. XII. 1) these plaintiffs may well join as plaintiffs [reads the rule]. Now it seems to me that that word 'severally' must comprehend the present case. I think, therefore, that they may very well join."

It must be observed that the point was one not necessary for the determination of the appeal, and was raised by the learned Judge, whose language has just been quoted, and was not fully argued at the bar. It must, however, be of much weight, not only as the opinion of that learned Judge, but of his brother Judges for whom he undertakes to speak. It is argued in Cunningham & Mattinson's Precedents of Pleadings (p. 4 *et seq.*) that if this exposition of the Act be correct it necessarily follows that the very widest liberty as to joinder of actions and parties was intended. For if eight persons can, under the one rule, by virtue of the word "severally," bring eight separate and distinct actions against the same defendant in the same action, they can, under the other rule, by virtue of the same word, bring such actions against any number of defendants, and that, therefore, A could sue Y upon a bill of exchange, and M for breach of contract; B can sue N for assault, and R for libel; C can sue in trover and so on, all in one and the same action. By this *reductio ad absurdum* they question the correctness of the decision, and suggest this construction:—"Where you have a given subject matter of litigation, all persons can be joined as plaintiffs who are entitled to any kind of relief, joint, several, or in the alternative, against any defendant liable jointly, severally, or in the alternative on that particular subject matter of litigation, but not otherwise." If the present writers may be permitted an opinion it would be that this statement of the rule is sound, and that Booth v. Briscoe, instead of conflicting with, is a good illustration of it. The rule requires that instead of looking at the persons, as heretofore, the subject matter of the action is to be considered (somewhat in the same manner as if proceedings were to be taken *in rem*), and permits a plaintiff to bring into one action all persons interested, or who may be interested. In Booth v. Briscoe the "given subject matter" was the libel, and all persons affected joined in the action although severally interested. See also Honduras v. Lefevre, L. R. 2 Ex. D. 301; Evans v. Buck, L. R. 4 Ch. D. 432; Child v. Stenning, L. R. 5 Ch. D. 695; *Id.* 7 Ch. D. 413.

*Principal and agent joined as defendants; plaintiff claiming that agent had authority to bind principal, and if not that agent should be held in damages.*—The Honduras Inter-Oceanic Railway Company v. Lefevre and Tucker, L. R. 2 Ex. D. 301, was an action brought by a Company against L. & T., the claim stated that L., through T., who professed to be, and in fact was, the agent of L., contracted to take a certain number of debentures in the plaintiff Company, which contract L. had failed to perform; and that L. denied that T. was authorized by him to make the contract. The plaintiffs prayed for specific performance of the contract or for damages against L.; or in the alternative, if it should appear that T. had no authority to act as L.'s agent, then for specific performance and damages against T. It was said by Cockburn, C. J., that rule 3 was confined to cases in which a plaintiff has a right of action at his option against either of two parties, as for instance, against a principal debtor and his surety. But this point was not determined. It was argued that if rule 3 was not wide enough that no relief could be given under rule 6, for that only applied to amendments in an existing cause. It was held that the case came under rule 6 if not under rule 3, and that the action was properly framed.

*Lessor and person claiming under him joined in an action of trespass.*—In Child v. Stenning L. R. 5 Ch. D. 695, in an action for trespass by the plaintiff, who was a lessee of W., the defendant, in his defence and counter-claim, to which he made W. a party, claimed a right of way by grant from W. prior to the plaintiff's lease, and prayed a declaration of his rights, and an injunction, and damages against the plaintiff; and in the alternative he prayed an indemnity and damages against W. The plaintiff amended his claim and made W. a defendant, and prayed an injunc-

O. XII.  
R. 1.

tion and damages against the original defendant, and in the alternative damages against W. :—Held by the Court of Appeal that W. was properly made a defendant to the amended claim under Rule 3, which is not confined to cases in which the alternative relief prayed against one defendant is consistent with that prayed against the other. Mellish, L. J., said :—"It is quite plain that by the rule power was given to a plaintiff to bring actions against several defendants in the alternative. That is what has happened in the present case. An action has been brought against several defendants, and the facts are such that the plaintiff must be entitled to relief against one or other of them. The Vice-Chancellor allowed the demurrer on the ground that the causes of action are not the same. If we were to say that two persons would not be joined as defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated. In most cases when alternative remedies are sought against two persons the causes of action are different : as in the case where an action is brought against an agent and his principal, because the plaintiff is uncertain whether he shall be able to prove the authority given to the agent, as in *Honduras Inter-Oceanic Railway Company v. Tucker*, L. R. 2 Ex. D. 301. There the plaintiff seeks compensation for one wrongful act, but he cannot tell which of two parties is really liable. I think it was exactly the case intended to be provided for by the rule."

The same case came on for hearing as reported in 7 Ch. D. 413, and it was held that the plaintiff was not at the hearing bound to elect against which of the defendants to proceed, but that the counsel of the lessor might support the case of the plaintiff against the other lessees.

*Publisher and proprietor of newspaper joined in action for libel.*—In *Edward v. Lowther* 34 L. S. T. N. s. 255, it was said, "The third rule lays down that 'All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative.' So that the proprietor could undoubtedly have been made a defendant with the publisher in the first instance. The 13th rule (Ont. r. 15 a.), says 'the Court or a Judge may . . . on such terms as may appear to the Court or a Judge to be just, order . . . that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually or completely to adjudicate upon and settle all the questions involved in the action, be added.' The words 'ought to have been joined' mean ought in order to do complete justice in the action. Here if the cause of action exists at all, it is clearly one that exists against both the publisher and the proprietor."

"Alternative."—See also O. XV. r. 13.

*Form when alternative relief asked.*—Alternative cases should not be mixed up together, but should be classed under separate headings, and alternative claims to relief should be clearly stated; per *Thesiger L. J.* in *Davy v. Garrett*, 38 L. T. N. S. p. 81.

## 90.

2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may order any other person or persons to be substituted or added as plaintiff or plaintiffs, upon such terms as may seem just.

See Eng. R. Sup. C., O. XVI, r. 2; R. S. O., c. 49, s. 5.

See notes to O. XII., r. 15.

3.  
the  
seven  
judg  
dant  
tive

Sec  
Sec

4.  
action  
for, c  
Cour  
prev  
expe  
action

See

Th  
terest  
wider  
causes  
connec  
words  
action  
Booth  
licatio  
merely  
indiv  
sary th  
betwe  
with t  
notes

De  
limited  
appoint  
for hel  
into a  
of the  
ment,  
husbar  
the bu  
all his  
to sell  
the ex  
the de  
wheth  
what  
purch  
was oc  
entitled  
interest  
purch

## 91.

3. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And, without any amendment, judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

See Eng. R. Sup. C., O. XVI., r. 3.

See notes to O. XII., r. 1.

## 92.

4. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

See Eng. R. Sup. C., O. XVI., r. 4.

The declaration that it shall not be necessary that every defendant shall be interested as to every cause of action, appears to countenance the argument for the wider construction of rules 1 and 3, and to shew that in one action a number of causes may be tried, with several of which some of the defendants may have no connection whatever. As pointed out, however, by Mr. Arthur Wilson, the words "cause of action" are capable of meaning either the fact out of which the action arises, or the legal relation to which that fact gives rise. For instance, in *Booth v. Briscoe*, L. R. 2 Q. B. 496, where eight persons were libelled by one publication, the cause of action, if viewed in one way, would be the publication merely, if in the other the wrong done to each individual and the corresponding individual right to damages. The effect of the rules then is, that it is not necessary that each defendant should be interested in the legal relationship existing between the plaintiff and the other defendants, but that he must still be connected with the facts, out of which a different legal relationship from his own arose. See notes to Rule 1.

*Demurrer for multifariousness.*—By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default of appointment, to the use of the trustees during the life of the wife, on trust for her, for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase money was paid to the trustees of the settlement, and a draft conveyance was approved, in the form of an appointment by the husband and wife to the purchaser, but before the conveyance had been executed the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees upon trust for his widow for life, and after her death to sell and divide the proceeds as therein directed. The widow, who was one of the executors, brought an action against the purchaser, the other executors, and the devisees in trust under the husband's will, asking the Court to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase money if the contract should be completed, and whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation out of the purchase money in respect of the plaintiff's life interest.—Held, that the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or

O. XII.  
R. 4.

on the ground that only a declaratory decree was asked for. James, L. J., said:—"Then as to the difficulty suggested, that the defendant, Barker, will be kept here as a party while questions in which he is not interested are dealt with and disposed of, one of the most beneficial of the rules under the new system is, that it is quite competent for the Court to say, We will have those two questions in which he is interested tried first—the two first questions, which relate entirely to the demurring defendant, viz., as to what are his rights under the contract—and the Court can put those two questions in the course of the trial in the first instance, and determine them as between him and the other parties, and he will not be prejudiced in any way by the other matters which have to be disposed of. It seems to me it would be quite right that the Court should determine in the first instance, what are the rights of Mrs. Barker as against the representatives of the testator." *Cox v. Barker*, L. R. 3 Ch. D. 359.

## 93.

5. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange and promissory notes.

See Eng. R. Sup. C., O. XVI., r. 5: G. O. Chy., No. 62. This rule is really covered by rule 3, see notes to rule 1.

Where two of five defendants, jointly and severally liable to the plaintiff, had become bankrupt, it was held that the action might proceed against the other three defendants without bringing the trustees in bankruptcy or the two bankrupt defendants before the Court, or giving them notice of the proceedings, *Lloyd v. Dimmack*, L. R. 7 Ch. D. 398.

See, as to parties in respect of joint and several demands, *Mayor of Berwick v. Murray*, 5 W. R. 208; *Colby v. Hawkins*, 6 Jur. 162; *McIntyre v. Connell*, 1 Sim. N. S. 252.

By G. O. Chy. No. 62, where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. The following are the principal cases decided under that Order:—

Where a surety files a bill to set aside a bond, the principal and co-surety are both necessary parties, *Allan v. Houlden*, 6 Beav. 148. Sureties cannot be sued without their principals, *Pierson v. Barclay*, 2 D. & Sm. 746; *Lloyd v. Smith*, 13 Sim. 457, 7 Jur. 460; *Seidler v. Sheppard*, 12 Gr. 456; *Cockburn v. Gillespie*, 11 Gr. 465; but plaintiff may elect against which of two principals, or which of two sureties, he will proceed, *Lloyd v. Smith*, 7 Jur. 460; and see *Wilson v. Goodman*, 4 Ha. 63.

This Order does not allow a partnership debt to be recovered against one partner's representative without making a surviving partner a party, *Hills v. McRae*, 9 Ha. 297; *Cox v. Stephens*, 2 N. R. 506. But see *Haig v. Grey*, 3 D. & Sm. 741; *Thorpe v. Jackson*, 2 Y. & C. 553.

Where a bill, besides charging a surviving executor with a breach of trust, seeks account of the personal estate of the testator, a personal representative of the deceased executor must be made a party, *Biggs v. Penn*, 9 Jur. 368; and see remarks on this case, *Shipton v. Rawlins*, 4 Ha. 619. In an administration suit all persons liable must be parties, *Hall v. Austin*, 10 Jur. 452; but where two classes of trustees committed a breach of trust, the *cestui que trusts* may proceed against one class only, *McGachen v. Dew*, 15 Beav. 84.

See also, *Atkinson v. Mackreth*, L. R. 2 Eq. 570; *Gray v. Lewis*, L. R. 8 Eq. 526; 18 Chan. App. 1052; *St. Aubyn v. Smart*, L. R. 3 Ch. App. 646; *Plumer v. Gregory*, L. R. 18 Eq. 621, 627; *Coppard v. Allen*, 2 D. J. & S. 173, 180.

## 94.

6. Where in any action, whether founded upon contract or otherwise, the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action. O. XII.  
R. 6.

See Eng. Sup. C., O. XVI., r. 6.

Notwithstanding the use of the words "in any action," it has been held that this rule is applicable to the commencement of an action as well as to a difficulty arising pending the action, the *Honduras Inter-Oceanic Railway Company v. Lefevre*, L. R. 2 Ex. D. 301; 25 W. R. 310, and 36 L. T. N. S. 46. The reports of these cases, however, are not quite consistent, see notes to r. 1.

## 95.

7. Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to, or in lieu of, the previously existing parties thereto.

See Eng. R. Sup. C., O. XVI. r. 7; G. O. Chy. Nos. 58, 61; Imp. Act 15, 16 Vic. c. 86, s. 42.

This rule is in substance a repetition of Order 61 of the Consolidated Chancery Orders which is by rule 14 of this Order declared to be in force as to actions in the High Court, *Mills v. Jennings*, L. R. 13 Ch. D. 649.

G. O. Chy. No. 61 is as follows:—"In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, the trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but, on the hearing, the Court, if it thinks fit, may order such persons, or any of them, to be made parties."

*Bill to execute the trusts.*—In *Cox v. Barnard*, 5 Hare 253, the effect of the Gen. Order is discussed. That case was a suit to execute the trusts of a will devising real estates to trustees for certain persons for life, and after their decease, for sale; with power to give discharges for the proceeds and the rents and profits, and with a direction to stand possessed of the moneys to arise thereby, upon trust for the children of the tenants for life, the trustees and the tenants for life being defendants; but there being no power of sale until after the death of the tenants for life, the Court, notwithstanding the 30th Order of August, 1841, directed that the children of the tenants for life should be made parties. Sir James Knight Bruce said:—"I entertain some doubt whether this case is within the terms of the 30th Order. That Order was intended to apply to real estate the principle which was applied in the case of personality. The executor represented the entire personal estate, and the parties beneficially interested were never made parties. Under this rule



## O. XII.

## B. 7.

personal property, to any extent, was administered by the Court. With regard to real estate it was otherwise. Notwithstanding the trustees might have the most unlimited powers of dealing with the estate, the parties beneficially interested, however small or remote their interest might be, were still held to be necessary parties. The Order was designed (as far as it goes) to give the same representative character to devisees in trust of real estate, which the principles of the Court gave to executors, in cases where the powers of the devisees were equivalent to the powers of executors. In this case the devisees in trust have no present power to sell; the power of sale does not come into operation during the lifetime of the tenants for life. The trustees have not, therefore, that dominion over the estate which executors have at law over the personal property of a testator. The Order refers to the possession of analogous powers in the two cases: to powers which the executors actually have at the time the Court is called upon to administer the estate, and not to powers which they will have at a future time, or after a certain event shall have happened. I think, therefore, that this is a case in which, even if the circumstances bring it within the language of the Order, I ought to exercise the discretion given to the Court in the latter part of the Order, and direct that the persons interested in remainder be made parties to the suit." See also *Densem v. Elworthy*, 9 Hare, app. 43; *Stewart v. Hunter*, 14 Gr. 132.

"*Bill to set aside the settlement.*"—In general, trustees do not sufficiently represent the *cestui que trust* in suits to impeach or set aside the instrument creating the trust, *Read v. Prest*, 1 K. & J. 183; *Houlding v. Poole*, 1 Gr. 206; *Rogers v. Rogers*, 2 Gr. 137; *Baker v. Trainor*, 15 Gr. 252; *Thomas v. Torrance*, 1 Ch. Ch. R. 46. But it is otherwise where the interests of one of the trustees conflicts with those of the *cestui que trust*, *Payne v. Parker* L. R. 1 Ch. Ap. 327. Where one of the trustees was tenant for life, and after the lapse of other estates was to hold the estate for the benefit of the children of P. C.:—Held, that the trustees sufficiently represented these interests, and that they need not be parties to a bill impeaching the trust deed as fraudulent against creditors, *Thompson v. Dodd*, 26 Gr. 381.

*Mortgage suits.*—In *Goldsmid v. Stonehewer*, 9 Hare, app. 38, Sir W. P. Wood, V.C., said:—"This is a claim for foreclosure by a first mortgagee against the mortgagor and the second mortgagee. Before the hearing of the claim, the second mortgagee filed an affidavit, in which he stated that the second mortgage was held by him as the trustee of a marriage settlement, under which trusts were declared for the husband and wife for their lives, and for the children of the marriage in remainder; and that some of the shares of the children had been again made the subject of other settlements. The question now is, whether, in order that a decree for foreclosure might be made, it is sufficient that the trustees of moneys secured by the second mortgage are parties without the *cestuis que trust* under the settlements being also parties. I have carefully considered the point, with the desire of relieving the plaintiff, as far as it could be safely done, from the necessity of bringing the persons beneficially interested before the Court. It was suggested that the Court might act on the principle which is applied in the case of executors, and which is now made applicable, in proper cases, to the trustees of real estate. If the mortgage had been made to the party or had become vested in him in the character of executor, it would be sufficient to make him a defendant, without any of the persons beneficially interested, and the decree of the Court would bind all the persons who might be so interested; but there is this difference between the case of an executor and that of a trustee, that the executor has the control of the whole estate of his testator, whilst the power of the trustee is limited to the particular fund which is the subject of the trust; and he has not necessarily the control of any other funds. I think, therefore, that the Court should not, by a decree of foreclosure against the trustee only, without giving the *cestui que trust* the opportunity of redeeming, foreclose all the parties interested under the settlements. Still, it is clear, that the infants and trustees of the settlements which have been made of the shares of the children in remainder cannot reasonably be expected to be in a position to redeem the estate, and not having the means of redeeming the mortgage, I think it is not necessary that they should be made parties. If the husband and wife, and the adult persons interested under the trusts of the original settlement are made parties, the order may be made."

In *Hanman v. Riley*, 9 Hare, app. 40, the distinction as to the necessity of making persons beneficially interested in real estate parties in suits by mortgagees for foreclosure or sale of mortgaged estates, against the persons having the legal interest only, where such persons are executors of the mortgagor, and where they are merely trustees of settlements of the mortgaged property, was pointed out.



Sir W. Page Wood, V. C., in referring to *Goldsmid v. Stonehewer*, said:—"That was the case of a settlement, and not of a will; and I was of opinion that as the trustees would be in possession only of the settled funds, and not of funds applicable to the purposes of redemption, it would be proper to require that the tenants for life under the settlement, and the children who had attained twenty-one, should be made parties. This is the case of a will, in which the devisees in trust are also the executors, and are, therefore, the persons in whom any funds which may be applicable to the payment of the debts of the testator, and to the redemption of the estate, are vested. I do not think it will be necessary, therefore, in this case, to make the *cestui que trust* parties. The decree may be made in their absence." See also *Sale v. Kitson*, 3 DeG. M. & G. 119.

O. XII.  
R. 7.

To a bill by trustees to foreclose a mortgage made for the benefit of creditors, the creditors are not necessary parties, *Fraser v. Sutherland*, 2 Gr. 442; *Shaw v. Liddell*, 1 U. C. L. J. 57. As to parties to a suit against trustees of a creditor's deed, see *Bateman v. Margerison*, 6 Ha. 496.

*A distinction exists between foreclosure and redemption suits.*—In *Mills v. Jennings*, L. R. 13 Ch. D. 639, Cotton, L. J., referring to *Goldsmid v. Stonehewer*, said:—"But that was a suit for foreclosure, in which the trustee was a defendant whom the plaintiff sought to foreclose; and there is reason in such a case for not giving the plaintiff the relief he seeks unless he brings before the Court all those interested in the equity of redemption who may probably have the means of redeeming the mortgage. Here the plaintiff trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the defendant, Jennings, so as to prevent any further proceedings for redemption in respect of the property vested in the plaintiff as trustee." On a bill for redemption of property vested in trustees under an absolute deed intended as a mortgage, one of the trustees being beneficially interested:—Held that the *cestui que trusts* were sufficiently represented, *Kerr v. Murray*, 6 Gr. 343; see also *Skiffen v. Davis*, Kay, app. 21; *Dickson v. Draper*, 11 Gr. 362; *Glegg v. Rees*, L. R. 7 Ch. App. 71; *Morley v. Morley*, 25 Beav. 253; *Shaw v. Hardingham*, 2 W. R. 637.

Where the whole estate is represented by the trustees, as in case the trustees are also executors, the representation is sufficient, *Marriott v. Kirkham*, 3 Giff. 546; *Sale v. Kitson*, 3 DeG. M. & G. 119; *Hanman v. Riley*, 9 Hare, app. 40; *DeLisle v. McCaw*, 22 Gr. 254; or, if the executors have a power of sale, *Smith v. Andrews*, 4 W. R. 353; but *secus* where there is an implied power only, *Bolton v. Standard*, 6 W. R. 570.

*Partition suits.*—The rule applies to proceedings under the English Partition Act, *Simpson v. Denny*, L. R. 10 Ch. D. 28.

*If the trustee has disclaimed* the rule does not apply, *Young v. Ward*, 10 Hare, app. 58; and see *Stansfield v. Hobson*, 16 Beav. 189.

*If the estate has to be sold* all parties should at least be made parties in the Master's office, *Doody v. Higgins*, 9 Hare, app. 32; *Piggott v. Piggott*, 8 L. T. N. S. 268; *Cuddick v. Cook*, 32 Beav. 70; *Stewart v. Hunter*, 14 Gr. 132. The effect of the service is to bind the interests of the persons served, *Doody v. Higgins*, 9 Hare App. 32; but they cannot be made to account without some independent proceeding to enforce the liability, *Walker v. Seligmann*, L. R. 12 Eq. 152.

*A suit charging a breach of trust* cannot proceed in the absence of the representative of one of the trustees liable to contribute, *Devaynes v. Robinson*, 24 Beav. 86; *Shipton v. Rawlins*, 4 Ha. 619. And see as to proceedings against some only of the parties to a breach of trust, *May v. Selby*, 1 Y. & C. 235; *Phillipson v. Gatty*, 6 Ha. 26; *Simes v. Eyre*, 6 Ha. 137; *Horsley v. Fawcett*, 11 Beav. 565; *Fowler v. Reynal*, 2 D. & Sm. 749. The order applies to breaches of trust, *Kellaway v. Johnston*, 5 Beav. 319; *Perry v. Knott*, 5 Beav. 293; and on an information against public trustees, *Att.-Gen. v. Pearson*, 2 Coll. 581; *Att.-Gen. v. Corporation of Leicester*, 7 Beav. 176.

*Discretion.*—The matter is one of discretion with the Court, *King v. Keating*, 13 Gr. 29; *Tudor v. Morris*, 22 L. J. Ch. 1051; *Dickson v. Draper*, 11 Gr. 362; *Cropper v. Mellersh*, 24 L. J. Ch. 430; *Wilkins v. Reeves*, 3 W. R. 305.

*Costs.*—As to costs where trustees or trustees and *cestui que trust* sever in their defence, see notes to O. VIII., r. 2.

## 96.

●. XII.  
B. 4.

8. Infants may sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of the Act; and may, in like manner, defend any action by their guardians appointed for that purpose, or by the official guardian, as the case may be.

As to the official guardian, his appointment, salary, etc., see the Statute, sec. 62.

As to service of a writ upon the official guardian, see O. VI., r. 4.

As to proceedings in default of appearance of an infant, see O. IX., r. 2.

On account of the supposed want of discretion of an infant and his inability to bind himself and make himself liable for costs he is incapable of commencing proceedings without the assistance of some other person who may be responsible to the Court for the propriety of the suit in its institution and progress. If no next friend be named the defendant may move to have the action dismissed with costs to be paid by the solicitor (*Daniell*, Ch. Pr. 67). Any person who is *sui juris* and is not a defendant may be a next friend, *Cross v. Cross*, 8 Beav. 455; *Payne v. Little*, 13 Beav. 114.

*Security for costs.*—The next friend of an infant need not be a person of substance, *re McConnell*, 3 Ch. Ch. R. 423. It is otherwise in the case of the next friend of a married woman, *Rann v. Lawless*, 1 Ch. Ch. 333; *Van Winkle v. Chaplin*, 2 Ch. Ch. R. 98.

*Two suits by different next friends.*—Where two suits have been instituted on behalf of an infant an inquiry will be directed as to which is more for his benefit, and will permit that one only to proceed, *Mortimer v. West*, 1 Swanst., 358. In *Campbell v. Campbell*, 2 M. & C. 25, it was held of several suits instituted on behalf of infants, and for the protection of their property, the Court will give a preference to that which is capable from its frame of being most beneficially and effectually prosecuted, notwithstanding that in point of form the relief sought by another is more extensive. The Lord Chancellor said:—"In such a case as this, where another next friend takes upon himself to file a second bill, it is incumbent upon him to shew some defect in the first suit, or a decided preference in the second. If their merits are only equal priority must prevail."

*Improper suit dismissed.*—In a clear case the Court, being of opinion that a suit had been commenced by the next friend of infants to promote his own views and not for the benefit of the infants, summarily, and without a reference to the Master, dismissed it, with costs to be paid by the next friend, *Sale v. Sale*, 1 Beav. 586.

In an administration suit on behalf of infants by a solicitor wholly unconnected with the family, it was, on motion of the defendant, referred to the Master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the Master the accounts prayed for by the bill, *Richardson v. Miller*, 1 Sim. 133.

But in *Smallwood v. Rutter*, 9 Hare 24, the Court refused to dismiss or refer to the Master for inquiry the bill of infant residuary legatees, filed by next friend, although the estate might have been administered under a claim, or the friend protected by payment into Court under the Trustee Relief Act, the propriety of any expenses incurred being a matter for consideration in ultimately dealing with the costs of the suit. The Court had regard to the exercise of the discretion of the father of the infant plaintiff in authorizing the suit, no improper motives appearing, although the father did not contribute to the maintenance of the infants, and lived apart from his wife by whom the infants were supported.

In *Dacosta v. Dacosta*, 3 P. Wms. 139, a father left a great personal estate to two infant children, and made his wife executrix. A bill was brought in the infants' name by a relation, as *prochein amy*, to call the mother to an account. On affidavit of several other relations, that this suit in the infants' name was out of pique, and not for the infants' good, the Court referred it to a Master, who reporting the matter to be so, the suit was stayed.

In *Nalder v. Hawkins*, 2 M. & K. 249, the Lord Chancellor said:—"The true principle which should govern all such cases is this. No discouragement ought to be thrown in the way of persons *bona fide* suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infants' advantages. While they appear to act *bona fide* they will be protected; the presumption will rather be in their favour; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them. But no strained presumptions will be made to protect them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed; or if the suit be useful to the infant; but the parties instituting it be unfit to conduct it, they must give place to others in whom the Court can better repose confidence." See also *Fox v. Suwerkrop*, 1 Beav. 583; *Guy v. Guy*, 2 Beav. 460; *Lyons v. Blenkin*, Jac. 259; *Clayton v. Clarke*, 3 DeG. F. & J. 682.

*Custody of Infants*.—See notes to sec. 17, s.-s. 9.

## 97.

9. Married women may sue or defend without their husbands and without next friends, in all cases relating to their separate estate, or to their separate engagements, contracts or torts; and also in suits for alimony; and in other cases by the leave of a Court or a Judge, on giving (in such other cases) such security (if any) for costs as the Court or a Judge may require.

See Eng. R. Sup. C., O. 16, r. 8; R. S. O., c. 125.

*Separate estate*.—Prior to *Con. Stat. U. C. Cap. 72*.—At Common Law the separate existence of the wife is not, as a general rule, known or contemplated, it being considered merged by the coverture in that of the husband, and the wife being no more recognized than is the *cestui que trust* or the mortgagor; the legal estate, which is the only interest the law recognizes being in others, she is not permitted by the common law to take or enjoy any real or personal estate, separate from, and independently of her husband. But in Equity, whose creature the wife's separate estate is, the case is widely different. There a married woman is considered capable of possessing property to her own use, independently of her husband; and upon once being permitted to hold property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*. *Snell's Eq.* 341.

*Creation of separate estate*.—Much discussion has arisen as to the words necessary for the creation of separate estate. *Spragge v. C.* (now Chancellor), in *Royal Canadian Bank v. Mitchell*, 14 Gr. at pp. 416, 417, summarizes the cases as follows:—"The distinctions in some of the cases are very nice, but in all of them, I think, it has been held not to be sufficient that the use, or even the absolute use, shall be in the wife, but the husband must be excluded in terms or by implication. In *Roberts v. Spicer*, 5 Mad. 491, the gift was by will, to a married daughter of the testator, of £200, 'to and for her own use and benefit,' and Sir John Leach 'held clearly that this could not be considered as a gift to the separate use of the wife.' In *Kensington v. Dollond*, the trust was to pay the fund to a married woman for her own use and benefit. I refer to the case principally for the language of Sir J. Knight Bruce, then Vice-Chancellor, 'the intention to give a separate estate, must be clearly expressed; a gift to a wife for her own use and benefit, does not clearly express such an intention.' The case is the less strong as an authority, that, in the previous part of the same instrument, the words 'sole and separate use' had been used. In *Rycroft v. Christy*, 3 Beav. 238, there was a bequest to trustees for the benefit of a married woman and her assigns for life, 'for her and their own absolute use and benefit;' the testator had a natural daughter by the married woman, and

• XII.  
B. 9.

the husband disclaimed. Lord Langdale said: 'I have, undoubtedly, very great difficulty in saying that, by the form of words contained in this will, the property is given to her for her separate use; when the circumstances are considered it is very probable that the testator so intended it, but I cannot say that such is the effect of the words.' In *Beales v. Spencer*, 2 Y. & C. C. C. 81, the trustees under a marriage settlement, were to pay the dividends or interest of a fund unto, or to empower the wife and her assigns to receive and take the same to and for, her and their own use and benefit; the husband became bankrupt, and the wife claimed the interest and dividends as separate estate; and the claim was decided against her. On the other hand, if the estate, real or personal, were expressed to be for the separate use of the wife, or for her independently of her husband, or if by any other form of expression the intention were manifested, that the wife should hold and enjoy the estate separately from or independently of her husband, then it would be separate estate. *Wagstaff v. Smith* (9 Ves. 520), and see other cases collected in the note to *Hulme v. Tenant in White and Tudor L. C.* (ed. 5) 521." See also as to what property is separate estate, *Redman v. Brownscombe*, 6 Pr. R. 84; *Hooper v. Maitland*, 7 Pr. R. 50; *Royal Canadian Bank v. Mitchell*, 14 Gr. 447; *Lawson v. Laidlaw*, 3 App. R. 77.

*Incidents of Separate Estate.*—Lord Westbury in *Taylor v. Meads* 34 L. J. Chy. 203, said: "When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use, that the married woman shall be independent of, and free from the control and interference of her husband; with respect to separate property the *feme covert* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the Common Law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. . . . The interest created by the separate use is a creature of a Court of Equity to which there is nothing correspondent at law, and which would be deprived of its character if it were made subject to a form of alienation that proceeds upon the basis of the existence of control and interest in the husband, and personal disability in the wife."

*Contracts by married women bind their separate estate.*—In *Lawson v. Laidlaw*, 3 App. R. 82, *Patterson, J. A.*, in dealing with this question, said:—"The Law of the Court of Chancery is concisely explained by Lord Hatherly in *Pickard v. Hime*, L. R. 5 Ch. 274, 276: 'There has been much discussion as to the precise mode in which a married woman's estate could be affected by anything except actual disposition. It was strongly felt by the Court that there was great injustice in protecting a married woman and allowing her to deprive others of their property by entering into engagements which she must have known herself unable to fulfil in any other way than out of her separate estate, though the Court seems to have felt some difficulties as to the manner in which the separate estate could be reached. At one time it was held that an appointment would be inferred; but Lord Cottenham, in *Owens v. Dickenson*, Cr. & Ph. 48, disposed of that by saying that if so the creditors must take in the order of the appointments. All these theories have been given up, and the doctrine has been placed upon a sound foundation by the decision in *Johnson v. Gallagher*, 3 D. F. & J. 494. Following that doctrine, the married woman in this case must be taken, in making this contract, to have dealt with respect to this property, and in such a case the Court will compel her to fulfil her obligations. . . . When she, by entering into an agreement, allows the supposition to be made that she intends to perform the agreement out of her property, she creates a debt which may be recovered, not by reaching her, but by reaching her property.' In the same case the Lord Justice Gifford summarizes the law with still greater brevity, at p. 277. His words are: 'As to the law of this case it is unnecessary to say anything, because, in the judgment of Lord Justice Turner in *Johnson v. Gallagher*, 3 D. F. & J. 494, everything relating to the subject is clearly laid down, and it amounts in substance to this: that a creditor having a claim against a married woman can come here and assert and enforce an equity as against her separate estate.' In *Johnson v. Gallagher*, 3 D. F. & J. 494, and also in *Picard v. Hime*, L. R. 5 Ch. 274, the married woman was living separate from her husband. That circumstance did not form one of the elements from which her liability was deduced. It was merely used as a piece of evidence aiding the conclusion that her intention was to pay the debt out of her separate property. In the former case the

Lord Justice said: 'She was, as I have said, living separate from her husband and had separate estate; and I think that where, under such circumstances, a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate estate, unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which she purchases.' In the case before us, the deposition of the defendant herself leaves no room for inference, as she clearly shews that she, in fact, had in her mind when she made the note, the intention which the Court, in the absence of evidence to the contrary, would have imputed to her. In *Mrs. Matthewman's case*, L. R. 3 Eq. 781, *Kindersley, V. C.*, says, following the doctrine in *Johnson v. Gallaher*, 3 D. F. & J. 494, 'It is clearly not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract expressly making her separate estate liable, such contract would bind it. Nor is it necessary that there should be any express reference made to the fact of there being such separate estate; for a bond or a promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation.'

"So in *McHenry v. Davies*, L. R. 10 Eq. 88, where the debt was created by endorsing a bill of exchange, Lord Romilly said, p. 90, 'Upon the simple fact that an English lady, possessed of separate property, in order to enable her agent to raise money, signs her name on a piece of paper, intimating that she will be liable to pay the amount, I am of opinion that when he has so raised the money on the faith of the credit given by the signature of her name, she cannot afterwards dispute her liability and say that she is not liable to make good the amount out of the property at her disposal.'"

*Nature of Creditor's lien on separate estate.*—In the same case *Patterson, J. A.*, upon this point said:—"It had been clearly established long before the case of the *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, was decided, that the debt of a married woman which was, for want of a more accurate term, sometimes said to be charged upon her property, was not so charged as to give the creditor a lien upon the property, or to prevent its alienation at any time before decree, *Ovens v. Dickenson*, Cr. & Ph. 48; *Johnson v. Gallagher*, 3 D. F. & J. 494, 7 Jur. N. S. 273. Yet some of the cases in which that doctrine was enunciated seem to have been cited to the learned Vice-Chancellor (the present Chancellor) who decided that case. Among the more recent dicta affirming the same doctrine is a judgment pronounced in 1876, by Sir George Jessel, upon an interlocutory motion for an injunction in the *National Provincial Bank of England v. Thomas*, 24 W. R. 1013. The remarks of the Master of the Rolls are so apposite to the general subject we are considering as to justify their quotation in full. He is reported to have said:—"This is an application of the holders of a promissory note signed by a husband and a wife, the wife being entitled to some separate estate, under a settlement against the wife and the trustees of the settlement, to recover the amount out of the separate estate. The plaintiff moves *ex parte* for an order to restrain the wife from dealing with her separate property; and the ground on which he bases his application is this: that the promissory note is unpaid; and he may be entitled, if it continues unpaid, to judgment directing payment out of the separate property then belonging to the married woman—judgment in the nature of what is sometimes called equitable execution. Now, neither the special nor general engagements of a married woman have any further effect against her separate property than to give the creditor a right to be paid out of it by obtaining execution. No charge is created upon the property. He is an ordinary creditor, and as such is in the same position, with respect to his debtor's property, whether the debtor is a man or woman; I must, therefore, refuse the application." See also the language of Gwynne, J., in *Merrick v. Sherwood*, 22 U. C. C. P. 470-5; *Kraemer v. Gless*, 10 U. C. C. P. 470; *Emrich v. Sullivan*, 25 U. C. R. 105, 107; *Wright v. Garden*, 28 U. C. R. 609. In *Horner v. Kerr*, 6 App. R. 30, a doubt was expressed as to whether a married woman could render herself liable under a joint contract.

This being the law respecting separate estate irrespective of statutory provisions it is proposed now to give the Statutes affecting the subject and the decisions thereunder.

*Con. Stat. U. C.*, c. 73.—The first section is as follows:—Every woman, who has married since the fourth day of May, one thousand eight hundred and fifty-



**O. XII.**  
**R. 9.**

nine, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property, whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest, or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, any law usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture.

Sec. 2. Every woman, who, on or before the said fourth day of May, one thousand eight hundred and fifty-nine, married without any marriage contract or settlement, shall and may, from and after the said fourth day of May, one thousand eight hundred and fifty-nine, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is on the said fourth day of May, taken possession of by the husband, by himself or his tenants, and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said fourth day of May, one thousand eight hundred and fifty-nine, and from his control or disposition without her consent, in as full an ample a manner as if she were sole and unmarried, any law, usage or custom to the contrary notwithstanding.

*Application of Con. Stat. U. C., c. 73.*—It will be observed that this section applies only (1) to women married since 4th of May, 1859, or if married before that date, to real estate not then taken possession of by the husband and personally not reduced into possession; and (2) where there is no marriage contract or settlement and that power is given only to "have, hold and enjoy all her real and personal property," &c. No power is given to convey property as a *feme sole*. In discussing the effect of this Statute, Draper, C. J., in *Lett v. The Commercial Bank of Canada*, 24 U. C. R., at p. 558, said:—"The Act, as I have already stated, is in my humble judgment to be construed as creating a marriage settlement, in the terms of the first or second sections, in all cases to which those sections respectively apply, and such settlement is to be dealt with as one made by a proper conveyance to trustees, before marriage, for the use of the intended wife."

In *Royal Canadian Bank v. Mitchell*, 14 Gr. 418, Spragge, V. C., in applying this language to the Act, said:—"She is to have, hold and enjoy her estate free from the debts and obligations of her husband, and from his control or disposition, without her consent, in as full and ample a manner as if she were sole and unmarried; and if I were placing a construction upon a marriage settlement, or will or other instrument of the like nature, I do not know that I could, consistently with the authorities, hold the real estate in question to be other than separate estate. But in the construction of a statute we have more to aid us than we have, generally, at least, in the construction of a private instrument. We are to look at the state of the law, before the passing of the Act, the mischief and defect intended to be remedied, and the remedy given by the Act." He then enters upon an analysis of the Act, and concludes as follows:—"The Act confers upon such property certain qualities incident to separate estate, but it withholds that quality which is the very foundation of the English decisions, the *jus disponendi*. But there is another provision in the Act which shows that it is only *sub modo*, if at all, that it makes the real property of the wife separate estate, for it recognizes an estate and interest in the husband during coverture, and provides that it shall not, during her life, be subject to his debts. It is of the essence of separate estate that the husband has no estate or interest in it. My construction of the Married Woman's Act is that it gives to what Lord Westbury calls the ordinary equitable estate of a *feme covert*, certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient probably, if found in a private instrument, to constitute a separate estate; but that upon a proper construction of the whole Act, certain qualities incident to a separate estate are withheld, and what is all important among them, that quality upon which the decisions making the separate property liable for the married woman's contracts is founded."

In commenting upon this case in *Lawson v. Laidlaw*, 3 App. R., at p. 85, Paterson, J., said:—"I understand the learned Chancellor to assert, not that the *jus disponendi* is essential to the existence of separate estate, for property settled to the separate use of a married woman without power of anticipation is clearly separate property, although she cannot dispose of it, but that the *jus disponendi*

is h  
deb  
A.  
esta  
whi  
sold  
cha  
ban  
supp  
affir  
reco  
wom  
sam  
and  
her  
unde  
a fe  
no e  
has  
erty  
to h  
and  
pay  
refer  
prop  
abov  
I  
cover  
rate  
S  
the r  
mar  
and  
of ar  
use,  
by th  
profit  
spect  
B  
now  
wom  
seven  
mann  
shall  
same,  
of he  
any c  
be a c  
tain  
real e  
R.  
made  
R.  
own  
any o  
the s  
prot  
chatt  
money  
marri  
respec  
unma  
Th  
Gr. 22

is held to be essential to an effectual charge of the property for the married woman's debts; which proposition is indisputable." In that case, in 1852, the defendant, C. A. L., became entitled, as one of her father's heirs-at-law, to a share in certain real estate, and she was married in 1854 without a marriage settlement. This property, which was never taken possession of either by her or her husband, was afterwards sold under a decree for the purpose of making parties partition. While the purchase money was in Court, to part of which she was entitled, C. A. L., at her husband's request, joined him in making a promissory note to the plaintiff for groceries supplied to her husband, intending to pay it out of the money in Court:—Held affirming the judgment of the County Court that the plaintiff was entitled to recover. Per Patterson, J. A.:—(1) The personal property enjoyed by a married woman under the Statutes of 1859 and 1872 is her separate property at law, to the same extent and with the same incidents as property settled to her separate use was and is in equity. (2) A promissory note made by a married woman for a debt of her husband is not a debt binding on her personally, either at Common Law or under the Statutes. (3) She may convey or charge her separate personal estate as a *feme sole* might do. (4) A promissory note or other general engagement derives no efficacy, as a charge or conveyance, from anything in the Statutes, and therefore has no effect except in equity. (5) When a married woman who has separate property contracts a debt, she is deemed in equity to have contracted it with reference to her separate property, and intending that it shall be paid out of that property, and if she had power to dispose of that property, equity will make it liable for payment of the debt. (6) The property so made liable must be property with reference to which she may be supposed to have contracted, and therefore must be property to which she is entitled when the debt is incurred. (7) *Semble*, that the above propositions apply equally to real property coming under the Act of 1872.

In *Horner v. Kerr*, 6 App. R. 30, it was held that the rents derived by a *feme covert*, married before 1859, from real estate acquired by her in 1865, were her separate estate.

*Statute 35 Vic., Cap. 16, Sec. 1*, is as follows:—After the passing of this Act the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the courtesy, and her receipt alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*.

By 40 Vic., Cap. 7, *Schedule A (166)*, the above section was amended, and it now reads in the R. S. O., c. 125, s. 4, as follows:—Sec. 4. The real estate of any woman married after the second day of March, one thousand eight hundred and seventy-two, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate therein of her husband during her lifetime, and from his debts and obligations, and from any claim or estate by him as tenant by the courtesy; and her receipts alone shall be a discharge for any rents, issues and profits of the same, but nothing herein contained shall prejudice the right of the husband as tenant by the courtesy in any real estate of the wife which she has not disposed of *inter vivos*, or by will.

R. S. O., c. 125, s. 19.—“Any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*.”

R. S. O., c. 125, s. 20.—“A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property, by this or any other Act declared to be her separate property, and shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels and property belonged to her as an unmarried woman; or any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.”

The effect of the *Statute of 35 Vic.* was discussed in *Boustead v. Whitmore* 22 Gr. 222. In that case the question was whether the husband of a married woman



## O. XII.

## R. 9.

would be a necessary party to a suit in which a conveyance of real estate was sought from the woman, and consequently whether it was necessary for the husband to join in the conveyance. Proudfoot, V. C., said: "If the 35 V. c. 16 has made the wife's estate a separate estate; if it has enabled her to make contracts; and if it has deprived her husband of any interest in her estate, then the reasons for these decisions falling, there will be no authority in support of this bill. This statute seems to me to strike at all these reasons. For while the former Act only declared that she should hold and enjoy her real estate free from the debts and obligations of the husband as if she continued sole and unmarried, this Act declares that she shall hold and enjoy it for her *separate* use; and she is to hold it free from any estate of the husband during her life time, or as tenant by the courtsey, thus depriving him of any interest in her estate; and it expressly clothes her with the power of making contracts respecting her real estate as if she were a *feme sole*. This last statute, depriving the husband of any estate in the wife's hands, enabling her to hold it to her separate use, and empowering her to make contracts regarding it, appears to me to bring her estate clearly within the cases cited by the Chancellor, establishing what is to be considered separate estate. And there is no restraint on her power of alienation. After some fluctuation of opinion, it has been finally decided that a married woman, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument *inter vivos* or will. The power given to the married woman to make contracts in regard to her real estate affords a strong argument in favour of this construction. She may, without the sanction of her husband, and it may be against his will, agree to sell her real estate; she may determine the price, and agree upon the terms of payment, and for these, the most material points in which, if any protection were required, it would have been given; and if the Legislature deemed her capable of going so far in the disposition of her property, it is not too much to assume that, for the merely ministerial act of making a conveyance, they did not mean to incumber her with requiring a needless assent to an inane formality," see also *Furness v. Mitchell*, 3 App. R. 510.

See, however, as to the right of a married woman to convey property covered by the Act without her husband joining in the conveyance, the opinion of Patterson, J., in *Furness v. Mitchell*, 3 App. R. 524; and of Wilson, J., (now C. J.) in *Ogden v. McArthur*, 36 U. C. R. 246.

*What property is affected by 35 Vic., c. 16 and 40 Vic., c. 7. schedule A (156), now R. S. O., c. 125.*—A question arose shortly after the passage of the Statute, 35 Vic., c. 16, as to whether the first section applied to marriages contracted before the passage of the Act. The words were "after the passing of this Act, the real estate of any married woman," etc. In *Dingman v. Austin*, 33 U. C. R. 190, it was held that the section applied only to marriages which took place after the Act, see also *McCready v. Higgins*, 24 U. C. C. P. 233. In *Adams v. Loomis*, 24 Gr. 242, however, a different construction was placed upon the section, and it was held that it applied to cases where lands have been acquired by married women after the passing of the Act, although the marriage took place before the Act came into force. The point next arose in *Furness v. Mitchell*, 3 App. R. 510, and the decision in *Adams v. Loomis* was approved. The Statute of 40 Vic. however transposes the first line, as was suggested by Moss, C. J. A., in *Furness v. Mitchell*, it would have to be transposed in order that the decision in *Dingman v. Austin* should be sound. In that Act the words are:—"The real estate of any woman married after the 2nd day of March, A.D. 1872," etc.; and other words follow which place it beyond doubt that the date of the marriage, and not of the acquisition of the property, determines the applicability of the Statute, see *Shelley v. Young*, 8 P. R. 36, and *Godfrey v. Harrison*, 8 P. R. 272.

*Separate estates in possession only are covered by R. S. O., c. 125.*—In *standard Bank v. Boulton*, 3 App. R. 93, the defendant, who was married in 1862, was by virtue of her marriage settlement entitled to the legal estate for life in certain lands after the death of her husband; and during his life endorsed a promissory note made by him to secure his liability to the plaintiffs. The land had been conveyed, but ineffectually, by the trustee under the settlement, to one B., and the defendant signed with her husband, a declaration that such conveyance was made at their request, to entitle B. to sell the land, and out of the proceeds to pay first the husband's debt to the plaintiffs. B. also wrote to the plaintiffs saying that the proceeds of any sale should be so applied. A decree having been made by Blake, V.-C., against the defendant, after her husband's death, to realize the amount out of such land, it was held that such decree must be reversed, for the property in questio

was not her separate estate within the meaning of 35 Vic. c. 16, s. 1 O. In rendering judgment, Moss, C. J. A., said:—"The whole scope of this legislation seems to be directed towards estates in which the wife had an immediate possessory interest—estates in which there were, or might be, rents, issues and profits—estates in which, at Common Law, and, but for special legislation, the husband would have an interest for life, to the exclusion of the wife, and might have a tenancy by courtesy after her death. This estate belongs to a very different class, and has none of these characteristics. No legislation was necessary to protect the wife in its enjoyment, for while the coverture lasted it was not in her possession, but her husband was the person entitled, nor can this properly be said to be real estate owned by the defendant, or acquired by her in any manner during coverture. Her interest, such as it is, depends upon the settlement alone, and had she not survived her husband, she would never have had any right to receive the rents, issues, or profits. Such an interest is within neither the language nor the spirit of the Statute." And Patterson, J. A., said:—"Leaving the Statutes and returning to the marriage settlement, it is clear the lands were not limited to the separate use of the defendant. So to limit lands which she was not to enjoy till after her husband's death, he having the enjoyment during his life, would have been a palpable absurdity. Therefore, although in general a married woman may hold a reversionary interest to her separate use, and may charge it by her general engagements, or by a specific charge—*Sturgis v. Corp.*, 13 Ves. 190; *Headen v. Rosher*, McL. & Y. 89; *Major v. Lamsley*, 2 Russ. & M. 355; *Doune v. Hart*, 2 R. & M. 360—in this case the remainder was not separate property, to which the doctrines of Equity, recognizing the *ius disponendi* and the power to charge as a *feme sole*, would apply."

In an action on a promissory note made by the defendant G., a *feme covert*, married after the 2nd March, 1872, without a settlement, and C., her brother, as trustees under their father's will, for the purpose of raising money to pay some insurances on the trust estate, it appeared that the testator had devised his real estate to his trustees on trust, to sell such portions as B. should deem expedient, and out of proceeds to pay debts and invest residue, and to expend income in maintenance of the trustees, and his other children, until the youngest should attain twenty-one; and on the youngest attaining that age, an equal division to be made amongst all the children, issue of deceased children to represent their parent:—Held, that until the coming of age of the youngest child, C. had no separate estate available in execution, and that she was not liable on the note. *Armour, J.*, however, in a most able judgment, holding that the true construction of the Married Woman's Property Act is to enable a *feme covert* to incur debts, to make engagements, and to enter into contracts as if she were a *feme sole*, and that the remedy in respect of any such debts, engagements, contracts, or torts, should be against her personally, and should not depend upon whether she ever had any separate estate or not. *Cameron, J.*, concurred in Mr. Justice *Armour's* opinion, but felt bound by the decided cases to decide otherwise.

*Recent English cases as to what property is affected by married woman's contract.*—In *Pike v. Fitzgibbon*, L. R. 14 Ch. D. 837, *Malins, V. C.*, declared that when a married woman creates an obligation upon her separate estate, it extends not only to that which she has at the time but to that which she may in any way acquire, and may have at the time when judgment is recovered, including (if her husband is then dead) estate given to her separate use with a restraint against anticipation. On appeal, however, it was held that covenants of a married woman did not affect any separate estate to which she was not entitled when the covenants were entered into; nor any separate estate as to which she was restrained from anticipation, S. C. W. N. (1881) 53 (not yet reported in the authorized reports). In *Flower v. Bulker*, L. R. 14 Ch. D. 665, it was held that a married woman can give a valid charge on her expectancy under the will or as one of the next of kin of a living person, and such a charge will be enforced after that person's death against separate estate bequeathed by his will to the married woman. To an action to enforce such a charge the trustees of the will are not necessary parties. This case, however, it must be observed, followed *Pike v. Fitzgibbon (ante)*, as decided by *Malins, V. C.*, and before its reversal in appeal. See also *Atwood v. Chichester*, L. R. 6 Q. B. D. 722; *Robinson v. Pickering*, W. N. (1881), 30.

*Separate engagements, contracts or torts.*—The Con. Stat. U. C. c. 73 did not enlarge a married woman's capacity to contract. Even if she were the owner of property which came under the protection of that enactment and was in that sense separate she was not liable to be sued upon her contracts, per Moss, C. J. A. in *Darling v. Rice*, 1 App. R. p. 52, but see *Lawson v. Laidlaw*, 3 App. S. 77. The

●. XII.  
R. 9.

Statute permitting actions at law to be brought was 35 V. c. 16 sec. 1, the closing words of which are, "and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*;" and sec. 9, the last words of which are "and any married women may be sued or proceeded against separately from her husband in respect of any of her *separate debts, engagements, contracts or torts* as if she were unmarried." The effect of this Statute was stated by Moss, C. J. A., in *Darling v. Rice*, 1 App. R. as follows:—"I think the object of this provision was to render it unnecessary any longer to join her husband as a defendant, when a suit was brought upon any separate engagement or contract binding upon her. In my opinion it should not be construed as extending her power to contract, but as defining the procedure which may be adopted when a suit or proceeding is conducted against her upon a contract or engagement on which she is liable. It did not make her liable upon every contract or engagement which she made apart from her husband, but shut the door against the objection that her husband should be a party when she or her property was sought to be made liable upon a contract or engagement which by any statute or equitable doctrine she was empowered validly to make;" and by Gwynne, J., in *Merrick v. Sherwood*, 22 U. C. C. P. 480, as follows: "The ninth section of the Act, as it seems to me, is to be construed as simply giving the appropriate remedies both *to* and *against* a married woman, which it was but just and proper should exist in connection with her altered status under the Act. Coupled therefore with the remedies to her for the recovery of the property, by this or *any other* Act declared to be her separate property, including therefore retrospective property accruing under sec. 6 of Consol. Stat. U. C. Ch. 73, the section provides suitable remedies *against* her, *namely*, that she may be sued separately from her husband, as if she were *unmarried*, for her separate debts, engagements, contracts and torts; thereby enabling her to be sued at law as if she were sole in respect of a debt, whereas before the Act she could only have been sued in equity, and with respect to her torts, to be sued alone, whereas before the Act she could only have been sued jointly with her husband. The subject matter of this *action* is a separate debt or engagement of the defendant in respect of which this ninth section now says she may be sued at law as a *feme sole*." This section was held to apply to debts contracted before the Act, *Merrick v. Sherwood*, 22 U. C. C. P., 467.

*Enforcing Judgment against Separate Estate.*—In *Field v. McArthur*, 27 U. C. C. P. at p. 20, Gwynne, J., said; "Since the passing of this Act, it appears to me that in actions brought against a married woman, sued separately from her husband, in respect of separate property enjoyed by her, to her own use, the form of our judgment should be similar to that which would be pronounced in Equity, *namely*, that it should be against the separate property by directing a sale of it, or so much thereof, if saleable, as will satisfy the plaintiff's demand or by way of charge upon the property; and that, therefore, if there be no such property shewn to exist out of which satisfaction of the plaintiff's demand can in whole or in part be obtained, there can be no judgment in favour of the plaintiff, but he must be nonsuited. And when it appears that the property of the married woman is vested in trustees, upon special trust to her use, it will in my opinion, be necessary that the trustees should be made parties defendants, in order that an effectual judgment should be pronounced, for although the statute expressly authorizes the wife to be sued separately from her husband in such cases, it does not authorize property which is vested in trustees upon special trusts for her use, to be sold upon an execution, issuing upon a judgment obtained against the *cestui que trust* alone."

In *Lawson v. Laidlaw*, 3 App. R., p. 91, Patterson, J. A., said:—"As to the judgment, I agree with Mr. Justice Gwynne in the suggestion made in *Field v. McArthur*, 27 U. C. C. P. 15, that it should be a decree charging the separate estate. Taking as a guide the form of decree in *Picard v. Hine*, L. R. 5 Chy. App. 274, the judgment may be that the plaintiff do recover out of the separate property of Catharine Laidlaw, which was at the date of the promissory note and is at the present time vested in her, or in any other person in trust for her, the sum of \$ (the amount of the note and interest), and \$ for costs taxed, making in all the sum of \$ , with which sum the said separate property is hereby charged. The question of execution may perhaps occasion embarrassment, but so it often does when the defendant is *sui juris*. In the case of tangible property, I see no reason why the sheriff should not seize it on a *fi. fa.*; any question of ownership being decided as in ordinary cases by interpleader or otherwise. If property is of a different sort, as money or stocks held by trustees or in the woman's own name, it may be reached by the process in use in equity or at law as the case may require.

*Collett v. Dickenson*, L. R. 4 Ex. D. 285, was an action brought against a married woman for debt contracted with a creditor who believed her to be a *feme sole*. She pleaded coverture, and the husband was then made a party. It was alleged that she had separate estate. At the trial it was declared that her separate estate was chargeable with payment of the debt and costs, and an inquiry was directed to ascertain of what her separate estate consisted, and in whom it was vested. In the answer to the inquiry the Master certified that the separate property consisted of an annuity, secured by the covenant of the husband contained in a separate deed and vested in a trustee. On summons by the plaintiff to shew cause why he should not be at liberty to sign judgment and the trustee not being a party:—Held that the Court could only make an order declaring the debt (with interest), and the taxed costs of the plaintiff to be a charge upon the annuity, but without prejudice to any claim by the trustee.

*Torts*.—Under the Act of 35 Vic., Mr. Dalton held that a married woman might be the sole defendant in an action of ejectment, her husband being permanently resident out of the jurisdiction. The wrongful possession being a "separate tort," *Warren v. Cotterell*, 6 P. R. 11. In *Amer v. Rogers*, 31 U. C. C. P., 195, Oslar, J., held that in an action for tort, committed by a wife during coverture, the husband was not a proper party but the wife must be sued alone.

*Next friend*.—The next friend of a married woman must be a person of substance, *Rann v. Lawless*, 1 Ch. Ch. R. 333; *Van Winkle v. Chaplin*, 2 Ch. Ch. R. 98. One married woman can act as next friend for another, *Giles v. Benjamin*, 6 P. R. 70. If no next friend is named the proper motion is to stay all proceedings until one is named, *McPherson v. McCabe*, 1 Ch. Ch. R. 250; so also if the next friend be a person of no substance the motion is to stay proceedings until one of substance be named, *Rann v. Lawless*, 1 Ch. Ch. R. 333; see also *Stovel v. Coles*, 3 Ch. Ch. R. 421; *Leishman v. Eastwood*, 2 Ch. Ch. R. 88.

(a) In cases not thus provided for, married women may sue as plaintiffs by their next friends in manner practised in the Court of Chancery before the passing of the Act.

## 98.

10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, in such action, on behalf of, or for the benefit of, all parties so interested.

See Eng. R. Sup. C., O. XVI., r. 9; G. O. Chy., Nos. 58-61.

This order embodies the practice which the Court of Chancery has always followed; for example, where the plaintiff files a bill on behalf of himself and all others, the creditors of the defendant or all others, the members of a Joint-Stock Company, *Daniell Ch. Pr. 172*; *Bromley v. Williams*, 32 Beav. 177; *Woodbridge v. Norris*, L. R. 6 Eq. 414; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note; *Hoole v. Great Western Railway Co.*, L. R. 3 Ch. app. 262.

*The question whether the persons not made parties would be bound by the proceedings came up in Smith v. Doyle*, 4 App. R. 471. In that case to a bill filed by the assignee of Patrick Doyle for the creditors, other than Dennis and James Sadlier, to impeach a sale of real estate to the defendant, the answer set up that before the proceedings in insolvency a bill was filed by Dennis and James Sadlier, as execution creditors, on behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance in question as a fraud upon creditors, and that the bill was dismissed upon the merits; it was further alleged, that the case made by the two bills was substantially the same, and that the defendant believed that the evidence in this suit would be similar in effect to that upon which the decree refusing relief was founded:—Held, reversing the judgment of the Court of Chancery, that the decree was not a bar to this suit. *Moss, C. J. A.*, said:—"The Sadliers did not represent the rights with which the assignee is now invested. Although their bill, to use the phraseology of the answer in this suit, purport to be on behalf of themselves and the other creditors who should contribute to the expenses of the suit, they did not and could not represent all

**O. XII.  
R. 10.**

the creditors of Patrick Doyle; no creditor but those who had put their claims into judgment could obtain any benefit from their success. There was no way in which creditors who had not proceeded to execution could come in even if a decree had been obtained, no other creditors were affected, except those who might have, after decree, elected to prove in the Master's office upon their executions, and who would then be prevented from proceeding with an independent suit. But even an execution creditor had no avenue for obtaining access to the suit until after a decree setting aside the conveyance, while there was no place at any time for creditors who had not taken proceedings at law. The plaintiffs might have compounded with the defendants, or dropped their suit without the slightest reference to other creditors. It does not seem to require any elaborate argument to shew that a decree in a suit bearing this character lacks the essentials of a judgment recovered. The only English case that I have succeeded in finding which presents even a semblance of supporting the contention is *Barker v. Walters*, 8 Beav. 92. The question before Lord Langdale was, whether a bill was sustainable which had been filed by three directors of a company or association on behalf of themselves and all other members, with the usual averment that the number was so large that it was impossible with reasonable convenience to join them as parties. In dealing with this, his Lordship considered the objection that, if such a suit were permitted, other shareholders might bring similar suits, and the defendant might be harassed and oppressed. In answer to this, the learned Judge said in substance, that it was his impression that if an unincorporated company gave its directors certain powers, and they incurred certain obligations towards others, and brought a suit for the benefit of themselves and all the members, the Court would prevent any other members from bringing a similar suit. But the want of similarity between that case and the present is quite obvious, nor is the case of *Commissioners, etc., of London v. Gellatly*, 24 W. R. 1059, at all analogous. It only decides that when a decree is made upon a bill establishing a right, it is binding upon a person not a party to the suit, who belongs to the class which the defendant represented, unless he can shew some good reason why he should not be bound. The principle is, that it is of the very essence of such a suit that the defendant should in the opinion of the Court, adequately represent the class, and that until satisfied upon this point, the Court will not proceed to an adjudication; but that, when satisfied, the Court will determine the right without requiring every individual in the same interest to be brought before it. In short, the very object of such a bill is to prevent the multiplicity of suits."

In *Williams v. Salmond*, 2 K. & J. 463, it was said that liberty to sue on behalf of oneself and other persons who are too numerous to be brought upon the record, is dependent neither upon the discretion of the Court nor upon the disposition of such other persons to concur in the suit. But if such other persons have an interest which might be affected in case the suit were allowed to proceed as on their behalf at the instance of the plaintiff, or if full justice cannot be done to the defendants without barring all such persons personally upon the record, the Court will not allow the suit to proceed.

*The former practice* was only permissible in cases where the number represented was so large that it was impossible, with reasonable convenience, to join them as parties, *Barker v. Walters*, 8 Beav. 92; *Commissioners of Sewers of the City of London v. Gellatly*, L. R. 3 Ch. D. 610. The above rule does not limit the new practice in this way, and it cannot be said that its effect has been as yet fully ascertained. In *DeHart v. Stevenson*, L. R. 1 Q. B. D. 313, a writ was issued by the plaintiff "on behalf of himself and numerous parties having the same interest." The claim was by the plaintiff, on behalf of himself and the other owners of a ship, against the defendants for freight and dues for the use of the ship. The defendants applied to add the names of the other owners as plaintiffs, under O. XVI., r. 13, (Ont. O. XII. r. 15 (a)), on the ground that the case was not within rule 9 (Ont. r. 10), and also in order that the defendants might have the liability of the other owners, as plaintiffs, for costs:—Held, that the action was rightly brought by a single plaintiff, under rule 9 (Ont. r. 10), and that the case was not within rule 13 (Ont. r. 15 (a)).

In all cases for the protection of property pending litigation and in all cases in the nature of waste, one person may move on behalf of himself and of all persons having the same interest, G. O. Chy., No. 58, r. 5.

For the rules in administration suits, see G. O. Chy., Nos. 58-61, quoted in notes to r. 14 of this Order.

*The writ should be endorsed* with a claim of the plaintiff "on behalf of himself and all others the etc.," *Cooper v. Blissett*, L. R. 1 Ch. D. 691; *Worraker v. Fryer*, L. R. 2 Ch. D. 109; *vs Royle*; *Fryer v. Royle*, L. R. 5 Ch. D. 540.



## 99.

11. In any case in which the right of an heir-at-law or of the next of kin, or of a class shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that in order to save expense or for some other reason it will be convenient to have the question or questions of construction determined before such heir-at-law, next of kin or class, shall have been ascertained by means of inquiry or otherwise, the Court may appoint some one or more person or persons to represent such heir-at-law, next of kin or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

See Eng. R. Sup. C. June, 1876, r. 7.

Where, upon the construction of a will, questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, the Court made an order under the rules of 26th June, 1876, Order XVI., rule 7 (Ont. O. XII., r. 11), appointing persons to represent the various classes of representatives, of which some one might be held to be entitled, before the questions of construction came to be decided. In *re Peppitt's estate*, Chester v. Phillips, L. R. 4 Ch. D. 230.

For form of order, see *Ibid*: Hobbs v. Reid, W. N. (1876) 95.

The Court may in any suit or proceeding, where it is made to appear that a deceased person, who was interested in the matter in question, has no legal personal representative, either proceed in the absence of any person representing the estate or may appoint some person to represent such estate, and that notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to perform by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate whereof representation is sought, R. S. O., c. 49, s. 9.

## 100.

12. Any two or more persons claiming, or being liable as, co-partners, may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.

See Eng. R. Sup. C., O. XVI., r. 10.

See all the rules relating to partners as parties to actions collected in note to O. IV., r. 2 (b).

*Quere*, whether in all cases it is competent to sue a firm under this rule, as where there has been an entire change in the constitution of the firm, although the name has been continued, *ex parte* Blain, *re* Sawers, 12 Ch. D. 522.

For forms of order, see Forms, No. 120.

## 101.

O. XII.  
R. 13.

13. Any person carrying on business in the name of a firm, apparently consisting of more than one person, may be sued in the name of such firm.

See Eng. R. Sup. C., June, 1876, r. 8.

See notes to preceding order.

## 102.

14. Subject to the Act and these Rules, the provisions as to parties, contained in Orders 58, 59, 60 and 61 of the General Orders of the Court of Chancery, shall be in force as to actions in the High Court of Justice.

See Eng. R. Sup. C., O. XVI., r. 11; Imp. Act, 15 & 16 Vic., c. 86, s. 42; G. O. Chy., No. 68.

The Orders of the Court of Chancery mentioned in this rule are as follows:—

Order 58. It shall not be competent to a defendant to take an objection for want of parties in any case to which the seven rules next hereinafter set forth apply.

Rule 1. A residuary legatee or next of kin may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin.

Rule 2. A legatee interested in a legacy charged upon real estate, or a person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate.

Rule 3. A residuary devisee or heir may have the like decree without serving any co-residuary devisees or co-heir.

Rule 4. One of several *cestuis que trust*, under a deed or instrument, may have a decree for the execution of the trusts of the deed or instrument, without serving any other of such *cestuis que trust*.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may move on behalf of himself and of all persons having the same interest.

Rule 6. An executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts.

Rule 7. An assignee of a chose in action may institute a suit in respect thereof without making the assignor a party thereto.

Ord. 59. In all the above cases the Court, if it sees fit, may require any other person to be made a party to the suit, and may, if it sees fit, give the conduct of the suit to such person as it deems proper; and may make such order in any particular case as it deems just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matter in question.

Ord. 60. In all the above cases the persons who, according to the practice of the Court, would be necessary parties to the suit, are to be served with an office copy of the decree (unless the Court dispenses with such service) endorsed with the notice set forth in schedule A, hereunder written, and after such service they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary, or set aside the decree, within fourteen days from the date of such service.



Ord. 61. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, the trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as executors or administrators, in suits concerning personal estate, represent the person beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially interested under the trust parties to the suit; but, on the hearing, the Court, if it thinks fit, may order such persons, or any of them, to be made parties.

G. XII.

R. 14.

Where residuary devisees, who had died abroad before the institution of the suit, were made parties in ignorance of their death, the suit may be proceeded with, without making their real representatives parties, *Bateman v. Cooke*, 1 W. R. 242.

Decree for the appointment of new trustees and conveyance of the trust estate, in a suit by some of the *cestuis que trust*, and a direction to serve the others with notice of the decree, *Jones v. James*, 9 Ha. app. 80. Money recovered from a trustee in a suit by *cestui que trust* to repair breach of trust as to one share of the trust estate, *McLeod v. Annesley*, 16 Beav. 600.

If the whole fund be not forthcoming, owing to a breach of trust, a party entitled to a moiety, although ascertained, cannot sue for payment without making the person entitled to the other moiety a party, *Lenaghan v. Smith*, 2 Phill. 301; *Munch v. Cockerell*, 8 Sim. 219. Where *cestuis que trust* by their conduct have made themselves trustees, they ought to be parties, *Jesse v. Bennett*, 6 D. M. & G. 609.

## 103.

15. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

See Eng. R. Sup. C., O. XVI., r. 13; G. O. Chy. No. 53.

Two cognate rules may be considered with this one:—O. XV., r. 18, provides that "No plea or defence shall be pleaded in abatement;" and O. XII., r. 2, as follows:—

Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may order any other person or persons to be substituted or added as plaintiff or plaintiffs, upon such terms as may seem just.

The first part of the above rule (15) is an extension of G. O. Chy. No. 53, by which no suit was to be dismissed by reason only of the misjoinder of persons as plaintiffs therein. That Order was held to apply to plaintiffs not named, as where a shareholder files a bill on behalf of himself and others, *Clement v. Bowes*, 1 Drew. 684; but not where full justice cannot be done to the defendants, *Williams v. Salmond*, 2 K. & J. 463.

"*Bona fide mistake*."—It will be observed that while, under rule 2 of this Order the power of the Court to substitute or add to plaintiffs is limited to cases in which there has been a *bona fide* mistake, the same power is given by rule 15 without any such limitation. Under this Order it is necessary to shew two things, (1) a *bona fide* mistake, and (2) that the amendment is necessary for the determination of the real matter in dispute. An application failing in one of these particulars may yet be successful under rule 15 of this Order, *Smith v. Haseltine*, W. N. (1875) 250; but see *Clowes v. Hilliard*, L. R. 4 Ch. D. 413. In *Duckett v. Grover*, L. R. 6 Ch. D. 82, after the allowance of a demurrer for want of parties plaintiff, leave was given to amend by adding a defendant as a co-plaintiff without any affidavit of mistake, and it was held that the words "*bona fide mistake*" include a mistake of law as well as of fact, (and see *Val de Travers Company v. London Tramway Company*, W. N. (1879) 46). After the amendment had been made another defendant moved to strike out the name of the Company so added:—Held, that the motion was wrong as such a motion could only be made by the company itself.

## G. XII.

## R. 15.

S. C. 25, W. R. 554. In *Turquand v. Fearon*, 27 W. R. 396, however, it was held that where the plaintiff moves to add a party plaintiff the Court will require proof of the consent of such person; and that the objection that there is no such proof may be taken by the defendant.

An alteration in the parties to an action will not be made on an *ex parte* application, *Tildesley v. Harper*, L. R. 3 Ch. D. 277.

"Necessary for the determination of the real matter in dispute"—"Ought to have been joined."—Any one who could have been properly joined at the commencement of the action—who, "in order to do justice," ought to be joined, is included under these words, *Edward v. Lowther*, 34 L. T. N. S. 255; *Honduras Ry. Co. v. Lefevre*, L. R. 2 Ex. 301. Amendments will be made in the interests of justice only and not to assist a merely technical right, *Collette v. Goode*, L. R. 7 Ch. D. 847; *Noad v. Murrow*, 40 L. T. N. S. 100; *Corby v. Cotton*, 3 U. C. L. J. 50; *McKenzie v. Vansickles*, 17 U. C. R. 226; and not if the effect will be to make the pleading demurrable, *Bank of Upper Canada v. Ruttan*, 22 U. C. R. 451.

"All the questions involved in the action."—In *Harry v. Davey*, L. R. 2 Ch. D. 721, B. agreed to purchase freehold hereditaments of A., who purported to sell under a power of sale contained in a mortgage to A., by C., as trustee and executor of the will of D. After acceptance of the title, and preparation of the conveyance, B. received formal notice from unpaid residuary legatees of D. of a claim by them to the property contracted to be sold. In an action by A. for specific performance of the agreement, a motion by B. that the residuary legatees, who had given notice of their claim, might be added as defendants to the action, was refused with costs, as no question arose which, for the purpose of being effectually adjudicated upon and settled, required that these residuary legatees should be added as parties.

*Misjoinder*.—As to misjoinder in a suit by some shareholders to recover money wrongfully paid to defendants and other shareholders, see *Williams v. Page*, 24 Beav. 654; as to parties to suits by shareholders generally, see *Carlisle v. South Eastern Railway Co.*, 1 M. & G. 689; as to misjoinder in a suit impeaching a settlement of accounts of an association, *Stupart v. Arrowsmith*, 3 Sm. & G. 176. Bill dismissed where only one of the plaintiffs had an interest to maintain the suit, and that interest was not claimed by the bill, *Barton v. Barton*, 3 K. & J. 512.

See also *Evans v. Coventry*, 3 Drew. 75, 5 D. M. & G. 911; *Beeching v. Lloyd*, 3 Drew. 227; *Carter v. Sanders*, 2 Drew. 248; *Mendes v. Guedalla*, 10 W. R. 485; *Betts v. Thompson*, L. R. 6 Chan. App. 735; *Umfreville v. Jones*, L. R. 10 Chan. 580.

Where a plaintiff is struck out after the defendant has appeared, the continuing plaintiff must give security for costs, *Fellowes v. Deere*, 3 Beav. 353; *Drake v. Symes*, 3 D. F. & J. 491.

One of several co-owners has a right to sue alone for the recovery of profits due for the use of the patent, *Sheehan v. Great Eastern Railway Company*, L. R. 16 Ch. D. 59.

One of several mortgagees can maintain an action to foreclose the mortgage, making the others co-defendants if they are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs, *Luke v. South Kensington Hotel Company*, L. R. 11 Ch. D. 121; reversing on appeal, S. C. L. R. 7 Ch. D. 789.

Where it appeared that the plaintiffs had no cause of action leave to add others as co-plaintiffs who had, was refused, *New Westminster Brewery v. Hannah*, W. N. (1876) 215; in appeal W. N. (1877) 35. But where the plaintiffs sued in their individual names, describing themselves as trustees of the Wesleyan Methodist Church of Brussels, an amendment was allowed at the trial by striking out the names and allowing them to sue as a corporation, under C. S. U. C. c. 69. The trustees of the Ainleyville Congregation of the W. M. Church v. Grewci, 23 U. C. C. P. 533.

For other cases, see *Wilson v. Church*, L. R. 9 Ch. D. 552; *Williams v. Andrews*, W. N. (1875) 237; *Cormack v. Geofrian*, W. N. (1876) 22; *Keate v. Phillips*, W. N. (1878) 186; *Roberts v. Evans*, L. R. 7 Ch. D. 830.

Any defendant to be added must be a person against whom the plaintiff has some claim which ought to be determined in the action.—*Norris v. Beazley*, L. R. 2 C. P. D. 80, shows this very clearly. The position of parties appears from the following extract from the judgment of Coleridge, C. J.:—"It is said that the present de-

fend  
really  
inclu  
woul  
the c  
the r  
to en  
bring  
has o  
that  
next  
Now  
is cer  
whom  
word  
serve  
have  
rectly  
be a  
ought  
the p  
claim  
is ana  
pany  
fenda  
wards  
this r  
tention  
ing to  
they o  
questi

An  
defend  
160.

In  
whom  
that h  
Churc

In  
owne  
tion w  
plainti  
cation

W  
plainti  
W. on  
acter,  
service  
without  
new de  
days a

In  
defend  
accept  
into, a  
tenant  
power  
execut  
the pla  
that sh  
those c  
The pe  
the act  
entered  
XVI.

defendant is a nominal defendant, that the Niger Merchants Company, the parties really interested, have a large claim against the plaintiffs in respect of a matter including this £500 bill sued upon, which, if the action were against the company, would be an answer to it, and that the defendant is in truth merely a trustee for the company. I should have thought, if the matter stood on the earlier part of the rule alone, that it was under those circumstances reasonably necessary, in order to enable the Court effectually and completely to settle the question involved, to bring the Niger Merchants Company before the Court. But the plaintiffs' counsel has directed our attention to the subsequent portions of the rule. It is provided that 'no person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto.' Now this, although it is not a case of making a person a plaintiff against his will, is certainly the case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be a plaintiff without his consent, but the succeeding words are stronger: 'All parties whose names are so added as defendants shall be served with a summons, etc., and the proceedings against them shall be deemed to have begun only on the service of such summons.' It seems to me to be correctly argued that those words plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. It seems to me that the application is answered, and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant between whom and the company there may be questions which will afterwards have to be settled. It seems to me that it is the more important to construe this rule strictly, because it is obvious that in many cases, if the defendant's contention is right its provisions might be made use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights, as against one person, with questions of a highly complicated nature arising between themselves and others."

An order was made at the trial to add as a co-defendant a person to whom the defendant had assigned his interest *pendente lite*, *Kino v. Rudkin*, L. R. 6 Ch. D. 160.

In an action against a corporation, where an officer of the corporation against whom no relief was claimed was made a party for the purpose of discovery:—Held, that he was improperly joined and that his name should be struck out, *Wilson v. Church*, L. R. 9 Ch. D. 552.

In *DeHart v. Stevenson*, L. R. 1 Q. B. 313, a suit was brought by one of several owners of a ship for freight on behalf of himself and his co-owners. An application was made by the defendant under this Order to add the other owner as co-plaintiffs in order that they might be liable for the costs of the action. The application was refused. Plaintiffs can only be added upon their own consent.

Where two actions had been ordered to be consolidated, on an application by the plaintiffs to add new defendants to the consolidated action before trial, and to make W. one of the original defendants, a party to the action in a representative character, the Court ordered that the proposed new defendants should be added without service of any writ, and that W. be made a defendant in his representative character without any further indorsement on the writ; such order to take effect unless the new defendants and W. should respectively shew cause to the contrary within eight days after service, *re Wortley, Culley & Wortley*, L. R. 4 Ch. D. 180.

In *Long v. Crossley*, L. R. 13 Ch. D. 388, an action was brought to compel the defendants specifically to perform an agreement into which they had entered to accept a lease of a coal mine from the plaintiff. When the agreement was entered into, and when the action was commenced, it was supposed that the plaintiff was tenant for life of the property under the will of her husband, and that she had a power of leasing. After notice of trial had been given the plaintiff died, and her executor obtained the common order of revivor. After this it was discovered that the plaintiff was tenant for life of the property under her marriage settlement, and that she had no power of leasing. She had signed the agreement "for myself and those entitled after me," though this did not appear in the statement of claim. The persons entitled in remainder, of whom the executor was one, desired to adopt the action and to be added as co-plaintiffs, alleging that the agreement had been entered into with their knowledge and approbation:—Held, that rule 13 of order XVI. of the Rules of Court, 1875 (Ont. O. XII. r. 15) applied, and that the

●. XII,  
R. 18.

remaindermen must be added as co-plaintiffs with the executor in his representative capacity.

*Objections for want of parties should be made promptly* and may not be postponed till the hearing where no impediment exists to raising the objection at once, *Sheehan v. Great Eastern Railway Co.*, L. R. 16 Ch. D. 59.

*General order to amend.—Striking out parties.*—Under an order to strike out the name of one defendant and giving general liberty to amend, the plaintiff is not justified in striking out the name of another defendant, *Wymor v. Dodds*, L. R. 11 Ch. D. 436. A party plaintiff may be added under a præcipe order to amend. Neither a party plaintiff nor a party defendant can be struck out under an order to amend obtained *ex parte*, *Dunn v. McLean*, 6 Pr. R. 97; and see *Elwon v. Vaughan*, W. N. (1879) 69.

*Form of order.*—In *Marquis of Londonderry v. Rhoswydol Lead Mining Co.*, W. N. (1879) 136, an order was drawn up as follows:—"Order that the plaintiff be at liberty to amend his writ of summons and statement of claim by adding Robert Girwood and George Green as defendants, with proper statements to charge them. And it is ordered that the said Robert Girwood and George Green have power to make defence as if the writ had been served upon them at the date of such amendment. The costs of the plaintiff and defendants of the said order, dated the 21st of May, 1879, are to be costs in the action, and it is ordered that the plaintiff pay the defendants their costs of this application." It was contended that it should be amended by striking out the words after "George Green" and down to the word "amendment," and to insert "on being respectively made defendants in this action, shall be in the same position and have the same rights as they respectively would have had if this action had been commenced against them at the date of the amendment, and date of service on them, of the said amended writ of summons." The Vice-Chancellor held that the order was in proper form.

*Vacating order.*—A defendant improperly added as a party may move to strike out his name, notwithstanding that he has delivered his statement of defence, *Vallance v. Birmingham Land Corporation*, L. R. 2 Ch. D. 369, and see *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. App. 101.

*Other amendments.*—See notes to O. XXIII., r. 1.

(a) The Court or Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out, and that the name of any party, whether plaintiff or defendant, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.

(b) No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto.

(c) All parties whose names are so added as defendants shall be served with a notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice.

## 104.

16. Any application to add, or strike out, or substitute a **O. XII.** plaintiff or defendant may be made to the Court or a Judge **R. 16.** at any time before trial by motion, or at the trial of the action in a summary manner.

See Eng. R. Sup. C., O. XVI., r. 14.

An objection, by a defendant, that other persons should have been joined as plaintiffs should be made promptly, and may not be postponed till the hearing where no impediment exists to raising the objection at once, *Sheehan v. Great Eastern Railway Co.*, L. R. 16 Ch. D. 59.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

## 105.

17. Where a defendant is added, unless otherwise ordered by the Court or Judge, the plaintiff shall sue out an amended writ of summons, and serve the new defendant with such writ, or notice in lieu of service thereof, in the same manner as original defendants are served.

See Eng. R. Sup. C., O. XVI., r. 15.

## 106.

18. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or Judge, be amended in such manner as the making such new defendant a party shall render desirable; and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice, or afterwards within 4 days after his appearance.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Amended."—As to mode of making amendments, see O. XXIII., rr. 9, 10. As to time for making amendments, see O. XXIII., r. 8. As to service of amended pleading, see O. XXIII., r. 11.

"4 days."—As to computation of time, see O. LII.

"Delivered."—Delivery includes filing: O. XV., r. 26.

## 107.

19. Where a defendant is, or claims to be, entitled to contribution or indemnity, or any other remedy or relief, over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff, defendant and any other person,

**G. XII.**  
**R. 19.**

or between any or either of them, the Court or a Judge may on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.

See Eng. R. Sup. C., O. XVI., r. 17; Judicature Act, s. 16, sub-s. 4.

This and the following rules meet a difficulty often experienced in practice. Heretofore if an action was brought against a surety who claimed contribution from a co-surety a verdict might be recovered which in a subsequent action by the former defendant against his co-surety might be shewn to be excessive. So also in the case of an action brought upon a contract entered into by the defendant as agent of a third person the principal was in no way bound by the result of the action. In such cases it is obviously desirable that all parties should be concluded by the result of the first action, and for this purpose that the third person should be at liberty to take part in the defence.

*This proceeding however must not be confounded with a counter-claim, as to which see notes to sec. 16, s.-s. 4.*

Two cases are provided for by the rules:—1. Where a defendant is entitled to contribution, indemnity, or other remedy or relief over against any other person. 2. Where from any other cause it appears to the Court or a Judge that a question in the action should be determined, not only as between the plaintiff and defendant but as between the plaintiff, defendant and any other person or between any or either of them.

It will be observed that the third person does not necessarily become a party to the action. He is served with a notice (see Form No. 18) which informs him of the nature of the action and of the claim of the defendant as against him, that if he wishes to dispute the plaintiff's claim he must cause an appearance to be entered within eight days after service and that in default of his so doing he will not be entitled in any future proceeding between the defendant and himself to dispute the validity of the judgment whether obtained by consent or otherwise. He may then elect whether he will intervene or not, but in either event he will be bound by the result.

*Claims between co-defendants.*—It was at one time thought that if one defendant claimed indemnity over against a co-defendant the proper mode of procedure was by counter-claim, *Shephard v. Beane*, L. R. 2 Ch. D. 223. But it is now determined that the notice under the above and following rules applies as between co-defendants as well as in the case of persons who are strangers to the action, *Furness v. Booth*, L. R. 4 Ch. D. 586; *Harris v. Gamble*, L. R. 6 Ch. D. 748. See also *McLay v. Sharp*, W. N. (1877) 216.

*May a third party added notify a fourth party.*—There has been some difference of opinion as to whether a third person, who has received a notice under these rules, may notify a fourth person, the fourth a fifth, and so on. In *Fowler v. Knoop* and the London Banking Association, W. N. (1877) 68; 36 L. T. N. S. 219, and *Witham v. Vane*, 49 L. J. Chy. 242, leave was given to a third person added to serve a notice upon a fourth. In *Walker v. Balfour*, 25 W. R. 511, a contrary opinion was expressed. In *The Yorkshire Waggon Co. v. The Newport and Abercarne Coal Co.*, L. R. 5 Q. B. D. 268, the point is stated in the head note with a *quere*.

*Examples.*—To a claim by plaintiffs for not accepting 183 chests of shellac, according to contract, defendants, among other defences, raised the defence that the shellac was not of the quality contracted for. The defendants had contracted with Messrs. R. and Messrs. T. respectively, for the sale to them of 50 chests on the same terms as their contract with plaintiffs, and the defendants cited Messrs. R. and T., under O. XVI., r. 18. Messrs. R. consented to be bound by the judgment in the action as to the quality of the shellac:—Held, that Messrs. R. and T. had been properly cited under O. XVI., r. 18 (Ont. O. XII., r. 20), and the Court directed that Messrs. T. should be at liberty to appear and defend the action, so far as regarded the question of the quality of the shellac, and that they should be bound by the finding of the jury on that question; and that the question of costs be reserved until after the trial, *Benecke v. Frost*, L. R. 1 Q. B. D. 419.

In order to entitle a defendant to serve a notice on a third person it is not necessary that the whole question between the plaintiffs, the defendant, and the third person should be identical, it is sufficient if it be *prima facie* made out that a material



question in the action is also a question between the defendant and the third person; and under such circumstances the Court will order service of the notice, if the plaintiff will not be prejudiced or delayed by the introduction of the third person. Therefore, when an action had been brought against the defendants for breach of charter party, by which they agreed to discharge a cargo of nitrate of soda as fast as the custom of the port of discharge would allow, and the defendants had sold, at Liverpool, to a company carrying on business in Scotland, the cargo to arrive, and it was shewn that by the custom of trade, of which the company were aware, on such a sale of such a cargo the buyers would be bound to discharge, in accordance with the custom of the port:—Held, that the defendants were entitled to an order citing the company to appear and take part in the trial, *The Swansea Shipping Company v. Duncan, Fox & Co.*, L. R. 1 Q. B. D. 644.

C. bought goods on credit from H. After delivery, but before the time for payment, C. became bankrupt. H., when the time for payment arrived, commenced an action against S. for the price, alleging that C. had bought the goods by the authority of S., and either on account of S. or on the joint account of S. and C., S. thereupon served the trustee with a notice. The trustee then applied for and obtained, in bankruptcy, an order restraining S. from taking or continuing any proceedings against the trustee:—Held, on appeal, that this order must be discharged, for that the case between H. and S. could not be tried in bankruptcy, and that S., if found liable in the action, ought not to have to try the same question again in bankruptcy between himself and the trustee, *ex parte Smith*; in *re Collie*, L. R. 2 Ch. D. 51.

B. agreed to purchase freehold hereditaments of A., who purported to sell under a power of sale contained in a mortgage to A., by C., as trustee and executor of the will of D. After acceptance of the title, and preparation of the conveyance, B. received formal notice from unpaid residuary legatees of D., of a claim by them to the property contracted to be sold. In an action by A. for specific performance of the agreement, a motion by B., that the residuary legatees, who had given notice of their claim, might be added as defendants to the action was refused with costs, as no question arose, which for the purpose of being adjudicated upon and settled, required that these residuary legatees should be added as parties, *Harry v. Davey*, L. R. 2 Ch. D. 721.

In *Horwell v. The London General Omnibus Company*, L. R. 2 Ex. D. 365, Kelly, C. B., said:—"The plaintiff alleges that the defendants, by their servants, so negligently drove an omnibus upon which the plaintiff was riding, that he was thrown off and sustained injuries. The defendants allege that they were not guilty of negligence, but that the tramway company were guilty. They now seek to make the tramway company a party to the action, and they rely upon Order XVI., rule 17 (Ont. O. XII., r. 19), but that rule has no application to this case. If the defendants cannot support their case under rule 18 (Ont. r. 20), or rule 19 (Ont. r. 21), they must fail. I will first comment upon rule 18 (Ont. r. 20). It only applies to cases 'where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action.' Is this a case of contribution? Clearly it is not. If the plaintiff fails there is an end of the case, but suppose that he establishes that the defendants were guilty of negligence, and recovers damages against them, the defendant cannot claim contribution from the tramway company, for the defendants and the tramway company would both be wrong-doers, and it is clear that there is no contribution between wrong-doers. The word contribution would also include a case where the members of a co-partnership are sued for goods sold, and where they have a dormant partner who ought to bear a portion of the price; for if the action succeeds against the original defendants they would be entitled to call upon him to pay a share of the money recovered from them. Is it a case of indemnity? By 'indemnity' the Legislature perhaps intended to provide for a case where a surety is sued alone, and he is desirous of making the principal debtor a party to the proceedings. Then does this case come within the words 'other remedy or relief over against any person not a party to the action.' That will apply to a case where an action is brought for the breach of warranty upon the sale of goods by sample, and the defendant alleges that he bought the goods by sample under a similar warranty; in that case, under these words, the defendant will be entitled to make his vendor a party to the action, and, if the plaintiff succeeds, to recover from him by reason of breach of warranty. But in the present case the defendants, by their notice, allege that the accident happened through the neglect of the tramway company; if they prove that at the trial the action will fail, but if it is not proved the plaintiff will be entitled to recover damages from them; but in either case they



**O. XII.**  
**R. 19.**

will not be entitled to any remedy or relief from the tramway company. I will now turn to rule 19 (Ont. r. 21). That rule refers to rule 17 (Ont. r. 19) in express terms, and provides that where it is made to appear that a question in the action should be determined not only as between the plaintiff and the defendant, but as between the plaintiff and any other person, or between any or either of them, the Court or a Judge shall direct notice to be given by the plaintiff. These words shew that the rule was intended to have a much more extended operation than rule 18 (Ont. r. 20), but is to be put in force at the instance of the plaintiff. Where it shall be made to appear to the Court or a Judge that by introducing another party to the record the plaintiff could sustain a claim either conditionally or in the alternative, in that case an order may be obtained to make that party a defendant, and the question between the plaintiff and the defendant may be raised and determined. In the present case, if the plaintiff had ascertained after he had brought the action, that the tramway company had caused the omnibus to strike against the van, than he might have obtained an order under rule 19 (Ont. r. 21), to make the tramway company defendants; but I repeat it must have been obtained at the instance of the plaintiff. The second defendant would be then compelled to plead to the statement of the claim, and the action would proceed against both. At the trial the plaintiff might succeed against one and fail against the other, or he might succeed as to both or fail as to both, but whatever might be the result all the questions between the parties would be determined."

In an action against T. and A., his wife, the claim alleged that W. owed the plaintiff £40, and that at his death he appointed by his will M. W. his residuary legatee; that M. W. died, having by her will appointed A., the female defendant, her residuary legatee; that the residuary estate of W. had been assigned by his surviving executor to the defendants. The plaintiff claimed payment of £40 from the defendants, but the surviving executor of W. was not made a party to the action:—Held, upon demurrer, that the claim disclosed a good cause of action, for even if the practice of the Court of Chancery would have required the surviving executor of W. to be joined as a defendant, the proper course (since the passing of the Judicature Acts, 1873, 1875,) for the defendants to take, if they wished to bring him before the Court, was to make him a party to the action under rules of the Supreme Court, O. XVI. R. 17 (Ont. O. XII. r. 19), *Hunter v. Young*, L. R. 4 Ex. D. 256.

In *Associated Home Company v. Whichcord*, L. R. 8 Ch. D. 487, the plaintiffs had purchased property from the defendant for £14,000, and they claimed in this action to have £2,000, part thereof, returned to them. The defendant was being sued in the Exchequer Division by persons who claimed the same £2,000 as commission moneys. The Court refused to make an order that the plaintiffs in the Exchequer Division should be served with a third party notice, or made defendants to this action, under rules of Court, 1875, O. XVI., r. 17 (Ont. O. XII., r. 19); see also *The Cargo ex Sarpedon*, L. R. 3 P. D. 28; *MacAllister v. The Bishop of Rochester*, L. R. 5 C. P. D. 194.

In an action by a company against its directors and others, seeking to make the defendants personally liable in respect of certain dividends alleged to have been improperly paid out of capital, the defendants applied for leave to serve third party notices on all the shareholders of the company, 450 in number, on the ground that if they, the defendants, were held liable, they would have a right over against the shareholders to recover from them the sums received by them by way of dividend:—Held (affirming the decision of Hall, V. C.), that the granting of the leave asked for would materially embarrass the plaintiffs in the conduct of their action, and that, therefore, the Court in the exercise of its discretion ought to refuse the application, *Wye Valley Railway Company v. Hawes*, L. R. 16 Ch. D. 489.

Defendants were allowed to withdraw on new defendants taking their place and admitting the cause of action and their liability as the original defendants had done, *Commissioners of Waterford v. Veale*, W. N. (1876), p. 23.

Where plaintiffs and defendants allege that a suit is occasioned by the conduct of a third party leave will be given to serve him with notice of the suit so that relief may be granted against him, *Treleven v. Bray*, L. R. 1 Ch. D. 176; see, however, *Yorkshire Wagon Company v. Newport Coal Company*, L. R. 5 Q. B. D. 268.

**Practice.**—When it is desired that a notice under these orders should be given to persons not already parties to the suit, the practice, as stated by Mr. Arthur Wilson, is to obtain an order, *ex parte*, giving leave to serve the notice. The authority cited, however, is *Pearson v. Lane*, W. N. (1875) 248, and in that case

the  
wo  
refe  
a n  
que  
is a  
of t  
  
oth  
whi  
noti  
16 C  
  
I  
T  
sum  
ther  
The  
sum  
  
I  
the  
ance  
to th  
Bene  
1 Q.  
Hart  
  
M  
consi  
it or  
  
F  
  
Co  
in the  
until  
when  
defenc  
only c  
in, an  
pany  
C. J.  
make  
costs  
any te  
I can  
defend  
to the  
sure th  
wheth  
gives r  
plainti  
such p  
ing the  
to do s  
The de  
and if  
why he  
sure, th  
respect  
Master  
49 L. J  
of the c  
to make  
it was h  
to deal

the order was made upon notice to the plaintiff. Quain, J., said:—"I think the words in rule 17 (Ont. r. 19), 'on notice being given to such last-mentioned person,' refers to the notice that the defendant now asks leave to give, and do not mean that a notice to the third party is necessary of this application. I think the preliminary question is exclusively between the plaintiff and defendant. But I think this is a question that should be discussed, and I hope it will be taken to the Division of the Court now sitting."

It seems reasonable that the plaintiff should have notice of such an application, otherwise proceedings might be taken in an action of which he knew nothing and which might delay or embarrass his proceedings. And it is now beyond doubt that notice must be given, *Wye Valley Railway v. Hawes*, 15 L. J. (notes) 136; L. R. 16 Ch. D. 489.

For form of the notice, see Forms, No. 18.

For form of indorsement, see Forms, No. 29.

The notice is to be served "according to the rules relating to the service of writs of summons," (see O. VI.) together with "a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action." The notice may be served out of the jurisdiction in the same manner as a writ of summons, *Swansea Shipping Co. v. Duncan*, L. R. 1 Q. B. D. 644.

If the person served desires to appear he may do so (using the Form No. 79 in the appendix) within eight days from the service of the notice. In case of appearance the party giving the notice applies to the Court or a Judge for directions as to the mode of having the question in the action determined, see rule 23 and *Benecke v. Frost*, L. R. 1 Q. B. D. 419; *Swansea Shipping Co. v. Duncan*, L. R. 1 Q. B. D. 644. Of this application the plaintiff must have notice, *Bower v. Hartley*, L. R. 1 Q. B. D. 652.

*Motion by third party to discharge or vary order.*—If a person served with a notice considers that the order allowing it to be served is improper, he may move to vary it or set it aside.

For form of order, see Forms, No. 123.

*Costs.*—The order made for prescribing the mode of determining the question in the action reserves the question of costs between the plaintiff and defendant until after the trial, *Benecke v. Frost*, L. R. 1 Q. B. D. 419. There is no power when admitting a third party, who has been served with notice to come in and defend, to order the costs to be in the discretion of the Judge at the trial. The only discretion as to costs is as to imposing them or not upon the party so coming in, and there are no means for giving him his costs, *Yorkshire Waggon Company v. Newport Coal Company*, L. R. 5 Q. B. D. 268. In that case Cockburn, C. J., said:—"It seems to me clear that the Master had no authority to make the order which he did, giving the Judge at the trial discretion as to the costs of the third and subsequent parties. There is no provision for imposing any terms except upon the party seeking to come in and defend the action. I can find no authority given, either by the Statute or by the rules, to make the defendant pay costs as between himself and the other parties who came in as parties to the action under the provisions of Order XVI. (Ont. O. XII). I am not at all sure that there ought to be any such provision as to costs. It is entirely optional whether a party to whom notice has been given will come in or not. The defendant gives notice to the third party that the plaintiff is suing him, and that, if the plaintiff succeeds he will claim his remedy over against the third party, and that if such party likes to come in and make himself a defendant, for the purpose of fighting the question in which he is interested, he may do so, but if he does not choose to do so he will be bound by the result of the action with regard to such question. The defendant cannot compel him to come in. It is optional with him to do so, and if he chooses to come in it seems doubtful whether there is any good reason why he should be entitled to call on the defendant to pay costs to him. I am not sure, therefore, that there is any omission in the provisions of the rules in this respect; but, however this may be, I can see no provision giving authority to the Master to make this order." This decision was, however, in *Dawson v. Shepherd*, 49 L. J. C. L. 529 (in appeal), said to have been a decision on the particular facts of the case and was not intended to exhibit a principle. The point as to the power to make an order as to costs, anticipatory of the trial, was not there decided; but it was held that there could be no doubt that at the trial the Court had full power to deal with the costs, and can award them to the third party. In this case after

**O. XII.**  
**R. 19.**

the third party had come in and participated in the defence, the original parties effected a settlement without reference to him. He, thereupon, moved for an order directing the defendant to pay his costs and was successful in appeal. The Court has no power to annul a direction in a judgment previously delivered, that a third party shall pay the costs of the interlocutory proceedings taken to bring him before the Court, although by the judgment in the action it is ordered that he be dismissed from the action, with costs to be paid by the defendants, *Benyon v. Godden*, L. R. 4 Ex. D. 246; see also *Witham v. Vane*, 49 L. J. (Chy.) 242; *Treleven v. Bray*, L. R. 1 Ch. D. 176.

**108.**

20. Where a defendant is entitled to contribution, indemnity or other remedy or relief over against any person not a party to the action, he may serve a notice to that effect;

(a) A copy of such notice shall be filed with the proper officer, and served on such person, according to the rules relating to the service of writs of summons;

(b) The notice shall state the nature and grounds of the claim, and shall unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his statement of defence;

(c) Such notice may be in the form or to the effect of the Form No. 18 in Appendix (B) hereto with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

**109.**

21. Where under Rule 19 of this Order it is made to appear to the Court or a Judge, at any time before or at the trial, that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or Judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper; and if made at the trial the Judge may postpone such trial as he may think fit.

**110.**

22. If a person not a party to the action, who is served as mentioned in Rule 20, desires to dispute the plaintiff's claim

in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within 8 days from the service of the notice; in default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise; provided always, that a person so served and failing to appear within the said period of 8 days, may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit.

**O. XII.  
R. 22.**

### 111.

23. If a person not a party to the action served under these Rules appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined;

(a) The Court or Judge, upon the hearing of such application, may, if it shall appear desirable so to do, give to the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions, as to the Court or Judge shall appear proper for having the question most conveniently determined, and with respect to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question, and as to the costs of the proceedings.

### 112.

24. A plaintiff is not to be unnecessarily delayed in recovering his claim by reason of questions between defendants in which the plaintiff is not concerned; and the Court or Judge is to give such direction as may be necessary to prevent such delay of the plaintiff, where this can be done, on terms or otherwise, without injustice to the defendants.

### 113.

25. Where a person not already a party to a suit is to be served with notice of a judgment or order for the purpose of binding him as if he had been originally a party, and such person is an infant, or person of unsound mind not so found

**○. XII.**  
**R. 95.**

by inquisition or judicial declaration, the notice shall be served in the same manner as a writ of summons.

See Eng. R. Sup. C., April, 1880, r. 7.

"Same manner as a writ of Summons." See O. VI., rr. 4, 5, 6; O. IX, rr. 1, 2.

**114.**

26. In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The Judge may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit.

See Eng. R. Sup. C., April, 1880, r. 8.

**ORDER XIII.**

**JOINDER OF CAUSES OF ACTION.**

**115.**

**○. XIII.**  
**R. 1.**

1. Subject to the following Rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action; but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

See Eng. R. Sup. C., O. XVII., r. 1; Eng. C. L. P. Act of 1852, s. 41.

The sections of the Common Law Procedure Act, R. S. O. c. 50, as to joinder of causes of actions, are as follows:—

Sec. 84. Causes of action of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit, but this shall not extend to replevin or ejectment, or in the County Courts to causes of action which are local and arise in different counties, and where two or more of the causes of action so joined in cases in the Superior Courts are local and arise in different counties, the venue may be laid in either of such counties.

Sec. 85. Either of the Superior Courts, or a Judge thereof, or the Judge of a County Court, may prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case any such Court or Judge may order separate records to be made up, and separate trials to be had, but nothing herein

contained shall restrict or diminish the obligation or right of a plaintiff to include **O. XIII.** in one action all or any of the drawers, makers, indorsers and acceptors of any **R. 1.** bill of exchange or promissory note.

Sec. 86. In an action brought by a man and his wife on any cause of action accruing personally to the wife, in respect of which they are necessarily co-plaintiffs, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the Court or a Judge thinks fit; but in case of the death of either plaintiff, such suit shall abate so far as relates to the causes of action, if any, which do not survive.

See Harrison's Common Law Procedure Act (2nd ed.) p. 84, *et seq.*

As to when a bill in Chancery would be multifarious from improperly joining in one bill distinct and independent matters, see Story, Eq. Pl. (4th ed.) sec. 271, *et seq.*

"*Several causes of action.*"—The preceding order (XII.) dealt with the subject of parties to an action. It assumed the existence of some one cause of action, and provided that various persons might be joined as parties, whether they were interested in that cause of action jointly, severally or in the alternative. The present order deals with the joinder of various causes of action, assuming the proper constitution of the action with respect to parties. There is therefore a close limitation of the power as to joinder of parties and causes of action. There must, as Mr. Arthur Wilson says (at p. 187) be either identity of subject matter, in which case O. XII. gives ample liberty in the choice of parties; or identity of parties, in which case O. XIII. gives a like liberty in the choice of subject matters. See remarks of Denman, J., upon this summary of Mr. Wilson's, in *Smith v. Richardson*, L. R. 4 C. P. D. 116.

*Action for price of goods, and by endorsee of a bill given for the price*, is embarrassing, and probably not in any event permissible under this rule, *Smith v. Richardson*, L. R. 4 C. P. D. 112.

*Several actions, several defendants, one subject matter.*—In *Howell v. West*, W. N. (1879) 30, the claim alleged that the plaintiff was a medical man and the defendant, West, head master of Epsom College, and the defendant, Jones, a medical man, practising as surgeon and apothecary in the neighbourhood of Epsom; that the college was under the management of the medical council; that the defendant, West, had a separate boarding-house of his own, where he received boys to be educated at the college, and which was exclusively under his own management; that the plaintiff required an assurance and promise from the defendant, West, that his son, John, if received by him, should be and remain under his or his wife's personal care, and not under the care of the council, and the defendant, West, gave this assurance; and it was agreed that the plaintiff should pay for such medical attendance as his son required; that upon these terms the plaintiff's son was received by the defendant West; that the plaintiff's son became ill and was attended by the defendant Jones; that the illness proving to be scarlet fever, with the sanction of the defendant Jones, the defendant West, caused the plaintiff's son to be removed to a room in the infirmary of the college, which was not in a fit state to receive him, and in which he was not properly attended; that owing to the removal the plaintiff's son became worse and died. As regarded the defendant, West, the plaintiff charged that he was guilty of a breach of contract with the plaintiff in causing the boy to be removed to the infirmary where he ceased to be under the defendant's own personal care, and was transferred to the care of the medical council, and further that he was guilty of negligence. As regarded the defendant Jones, the plaintiff charged that the defendant was employed to attend upon his son, but that he neglected to exercise reasonable skill and care. In the alternative the plaintiff charged that the defendant Jones, as a surgeon and apothecary, warranted that he would exercise reasonable skill and care in his attendance upon his patients, yet, that being employed to attend the plaintiff's son, he did not possess, or neglected to exercise, reasonable and competent skill and care. The plaintiff alleged that he had incurred expenses and loss in attending himself, and in procuring attendance upon his son, and in procuring assistance in his business during his absence. Denman, J., ordered the claim to be struck out on the ground that it was embarrassing; the Queen's Bench Division affirmed the decision of Denman, J., on the ground that there was a misjoinder. The plaintiff appealed. The Court (Bramwell, Baggally, and Thesiger, L. J.J.) held that the claims were rightly joined, and allowed the appeal; the defendants to be at liberty to deny, in general terms, the averments of the claim.



**C. XIII.**  
**R. 1.**

*Cancellation of partnership or dissolution.*—Plaintiff, by his statement of claim, claimed to have an agreement for a partnership with the defendant in a land speculation cancelled on the ground that he had been induced to enter into it by the misrepresentation of the defendant and in ignorance of its effect; or in the alternative that the partnership created by the agreement might be dissolved and the accounts taken, and the defendant restrained from interfering with the management of the works or violation of the agreement:—Held, that there was no inconsistency in the alternative claims or in the allegations in support of them, *L. R. 7 Ch. D. 1*.

*Recovery of land.*—See next rule.

*Costs.*—The plaintiff lessee of land brought an action against the lessor and against other lessees who claimed a right of way over the plaintiff's land, denying the right and claiming an injunction against him, or if the Court should hold that they had under their lease a right of way, then damages from the lessor:—Held, that the plaintiff was not at the hearing bound to elect against which of the defendants to proceed, but that the counsel of the lessor might support the case of the plaintiff against the other lessees. Judgment having been given for the other lessees establishing their right of way, and the plaintiff's right to indemnity from the lessor being then admitted:—Held, that nevertheless the lessor would not be ordered to pay to the plaintiff the costs incurred by making the other lessees defendants, *Child v. Stenning, L. R. 7 Ch. D. 413*.

## 116.

2. No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are or is held; and except claims in actions on mortgages, for the recovery of the mortgage money and for foreclosure or sale.

See Eng. R. Sup. C., O. XVII., r. 2.

*"Unless by leave."* *Time for application.*—An application for leave to join another action with an action for the recovery of land must be made before the writ is issued. Where another action had been joined with an action for the recovery of land without leave, the Court refused to grant leave to continue the action in that form, although the defendants had appeared. The rule which enables the Court to enlarge the time for doing an act is not applicable to such a case, in *re Filcher, Filcher v. Hinds, L. R. 11 Ch. D. 905*.

*"Action for the recovery of land."*—The saving clause in favour of mortgage suits is not in the English Act. It had been held, moreover, that a mortgage suit is not an action for the recovery of land, *Barwick v. Barwick, 21 Gr. 39; Tawell v. Slate Co., L. R. 3 Ch. D. 629*.

An action "to establish title to land" is an action "for the recovery of land," so as to require the leave of the Court under this rule for its joinder with another cause of action, *Whetstone v. Dewis, L. R. 1 Ch. D. 99*.

An action "to establish title to land," not claiming possession, is not an action "for the recovery of land" so as to require the leave of the Court for its joinder with another cause of action, *Gledhill v. Hunter, L. R. 14 Ch. D. 492*. In this case the Court declined to follow *Whetstone v. Dewis, L. R. 1 Ch. D. 99*. Where the writ was indorsed, for declaration of title, declaration that a lease was granted under a mistake, recovery of rents and profits, and a receiver, and the statement of claim asked also for possession:—Held, that this was an action for recovery of land and nothing else, and that there was no joinder of any cause of action which required the leave of the Court, *Gledhill v. Hunter, L. R. 14 Ch. D. 492*.

*When leave will be granted.*—An action for the administration of personal estate may be joined with an action to establish title to real estate, where the plaintiff claims both estates under a common gift in the same will, *Id.*; and see *Kitching v. Kitching, 24 W. R. 901*.



Where the action is for the recovery of land and of a deed relating to the land, the joinder of these causes of action will be allowed, *Cook v. Euchmarch*, L. R. 2 Ch. D. 111; *Manisty v. Kenealy*, 24 W. R. 919. A claim for a receiver may be joined with an action for the recovery of land, *Allen v. Kennett*, 24 W. R. 845. And see notes to O. XII., r. 1.

"Court or Judge."—See notes to O. IV., r. 1 (a).

## 117.

3. Claims by an assignee in insolvency as such shall not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity.

See Eng. R. Sup. C., O. XVII., r. 3.

## 118.

4. Claims by or against husband and wife may be joined with claims by or against either of them separately.

See Eng. R. Sup. C., O. XVII., r. 4; R. S. O., c. 50, s. 86; Eng. C. L. P. Act of 1852, s. 40.

## 119.

5. Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

See Eng. R. Sup. C., O. XVII., r. 5.

There was difficulty formerly in knowing which way to sue, *Bolingbroke v. Kerr*, L. R. 1 Ex. 222; *Mosely v. Rendall*, L. R. 6 Q. B. 338; *Abbott v. Parfit*, 6 Q. B. 346.

A defendant must not set up by way of a counter-claim against the claim of a plaintiff suing only in a distinct personal character, claims against him personally and also as an executor, *Macdonald v. Carrington*, L. R. 4 C. P. D. 28.

## 120.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

See Eng. R. Sup. C., O. XVII., r. 6.

See O. XII., r. 1, and notes.

## 121.

7. The last 3 preceding Rules shall be subject to Rule 1 of this Order, and to the Rules hereinafter contained.

See Eng. R. Sup. C., O. XVII., r. 7.

## 122.

O. XXII.  
R. 5.

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

See Eng. R. Sup. C., O. XVII., r. 8; R. S. O., c. 50, s. 85; Eng. C. L. P. Act of 1852, s. 41.

*"Cannot be conveniently disposed of in one action."*—Under rule 1 of this order, where such causes of action have been joined, separate trials may be ordered, or such other order may be made as may be necessary for the separate disposal thereof. Under the present rule (No. 8) an order may be made confining the action to such of the causes of action as may be conveniently disposed of in one action. The next rule (No. 9) refers to the order to be made as one by which some of the causes of action are "to be excluded." Under O. XXXI., r. 3, different questions may be tried in different modes and some issues may be tried before the others. It is presumed that orders will be made under each of these orders according as under the circumstances of the case it may seem most advisable. But see Wilson's Judicature Acts, p. 189.

For the cases shewing what issues can be conveniently tried together, see notes to sec. 16, sub-s. 4 of the Act.

*"Court or a Judge."*—See notes to O. IV., r. 1 (a).

## 123.

9. If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just.

See Eng. R. Sup. C., O. XVII., r. 9.

*"Amended."*—As to mode of making amendments, see O. XXIII., rr. 9, 10; as to time for making amendments, see O. XXIII., r. 8; as to service of amended pleading, see O. XXIII., r. 11.

## ORDER XIV.

## ACTIONS BY AND AGAINST LUNATICS AND PERSONS OF UNSOUND MIND.

## 124.

O. XIV.  
R. 1.

In all cases in which lunatics and persons of unsound mind, not so found by inquisition or judicial declaration, might respec-

tively before the passing of the Act have sued as plaintiffs, or would have been liable to be sued as defendants, in any action or suit, they may respectively sue as plaintiffs in any action by their committees or next friends in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.

"Committees."—Idiots and lunatics sue by the committees of their estates, *Ridder v. Ridder*, 1 Eq. Ca. abr. 279; *Prac. Reg.* 272. Sometimes informations have been exhibited by the Attorney-General on behalf of both idiots and lunatics, considering them as under the protection of the Crown, *Attorney-General v. Parkhurst*, 1 Ca. Ch. 112; *Attorney-General v. Woolrich*, 1 Ca. Ch. 153; particularly if the interests of the committee have clashed with those of the lunatic, *Attorney-General v. Panther*, 2 Dick. 748; and see *Attorney-General v. Tyler*, 2 Ed. 230. The lunatic must be made a party as well in a bill as in an information on his behalf, 1 Dan. Pr. Persons of weak or unsound mind, not so found by inquisition, have been permitted to sue by their next friend, without the intervention of the Attorney-General, *Wartnaby v. Wartnaby*, Jac. 377; and see *Price v. Berrington*, 7 Ha. 394; see Dan. Chy. Pr. 80; see also notes to O. VI., r. 6.

"Next friends."—When a bill was filed without authority in the name of a person who was afterwards proved to be sane, the next friend had to pay all the costs, *Palmer v. Walesby*, L. R. 3 Ch. 732; and see *Wartnaby v. Wartnaby*, Jac. 377.

The next friend of a lunatic need not be a person of substance, *Sharp v. Sharp*, 2 Ch. Ch. R. 244.

*Jurisdiction.*—In the matter of lunatics and their estates, the Court of Chancery in this Province has much more extensive jurisdiction than is possessed by the Court of Chancery in England. "In the case of lunatics, idiots, and persons of unsound mind, and their property and estates, the jurisdiction of the Court shall include that which, in England, is conferred upon the Lord Chancellor by a commission from the Crown, under the sign manual," R. S. O., c. 40, s. 58.

As to the distinction between the jurisdiction exercised by the Lord Chancellor in Chancery and in Lunacy, see *Murray v. Frank*, 2 Dick. 555; *Sherwood v. Sanderson*, 19 Ves. 280.

"Guardian."—See O. IX., r. 1, 1 (a).

## ORDER XV.

### PLEADING GENERALLY.

#### 125.

1. The following Rules of pleading shall be substituted for those heretofore used in the Court of Chancery and in the Courts of Common Law.

See Eng. R. Sup. C., O. XIX., r. 1.

"Pleading" shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant, *Judicature Act*, sec. 84.

For the rules of pleading heretofore in use in the Court of Chancery, see G. O. Chy., Nos. 74-85, 120, 122-133.

The rules of pleading in the Courts of Common Law may be found in *Harrison's Common Law Procedure Act* (2nd ed.) 706.

## 126.

**O. XV.  
R. 9.**

2. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of claim, the plaintiff shall within such time and in such manner as hereinafter prescribed, deliver to the defendant after his appearance a statement of his claim and of the relief or remedy to which he claims to be entitled; or a notice in lieu of such statement as provided by Order 17 of these Rules.

See Eng. R. Sup. C., O. XIX., r. 2.

"*At the time of his appearance.*"—The statement is made in the appearance; see Forms, Nos. 78, 81.

"*Within such time.*"—The statement is to be delivered within 3 months from the time of the defendant's entering his appearance, O. XVII., r. 1 (a).

"*Deliver.*"—Delivery in this case includes filing, although it is otherwise in England; see O. XV., r. 26. As to mode of delivery, see O. XV., r. 8.

"*Statement of his claim.*"—See subsequent rules of this order.

(a) The defendant shall, within such time and in such manner as hereinafter prescribed, deliver to the plaintiff a statement of his defence, set-off, or counter-claim (if any).

See Eng. R. Sup. C., O. XIX., r. 2.

"*Within such time.*"—The time limited is 8 days from the delivery of the statement of claim, O. XVIII., r. 1.

"*Delivered.*"—Delivery in this case includes filing, O. XV., r. 26. As to mode of delivery, see O. XV., r. 8.

"*Counter claim.*"—See notes to s. 16, sub-s. 4.

(b) The plaintiff may, in like manner, deliver a statement of his reply (if any) to such defence, set-off, or counter-claim.

See Eng. R. Sup. C. O. XIX., r. 2.

"*May.*"—The English corresponding order uses the word *shall*. By the interpretation Act, R. S. O., c. 1, s. 8, sub-s. 2, the word *shall* is imperative and the word *may* permissive. The reason for the change from the English Act is not apparent, for, by O. XX., r. 1, it is provided that "a plaintiff shall deliver his reply, if any, within 3 weeks after the defence, or the last of the defences, shall have been delivered, unless the time shall be extended by the Court or a Judge."

"*Statement of his reply.*"—See O. XX.

A counter-claim must claim relief against the plaintiff, and he must be made a party to it, and the relief sought by a counter-claim must relate to the specific subject matter of the action. Where a counter-claim sought an indemnity, the indemnity must be confined to the specific property which was the subject of the action, *Harris v. Gamble*, L. R. 6 Ch. D. 748; *Fadwick v. Scott*, L. R. 2 Ch. D. 736. *Shepherd v. Beane*, L. R. 2 Ch. D. 223, cannot now be cited as an authority; see *Harris v. Gamble*, *supra*.

Where two or more plaintiffs sue for a joint claim, the defendant may set up against each individual plaintiff separate counter-claims sounding in damages, *The Manchester, Sheffield, & Lincolnshire Railway Company and the London and North-western Railway Company v. Brooks*, L. R. 2 Ex. D. 243. A counter-claim must contain in itself a specific statement of the facts upon which

reliance is placed for the relief claimed. It is not sufficient that the facts relied upon appear in the statement of defence, even although that and the counter-claims form one continuous document, *Crowe v. Barnicott*, L. R. 6 Ch. D. 753. But, where a writ of *ne exeat* against a defendant was obtained by the plaintiff immediately after the commencement of the action, and the defendant was arrested, he, by his statement of defence, alleged that the writ had been improperly obtained and claimed damages for the arrest, making the allegation of the improper issue of the writ and the claim for damages in one paragraph of the statement of defence, which was numbered consecutively with the others, and not headed separately as a counter-claim:—Held that the pleading was good as a counter-claim, *Lees v. Paterson*, L. R. 7 Ch. D. 866.

The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from defendant to the assignor upon a building contract. The defendant pleaded by way of set-off and counter-claim that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—Held that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off, or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly, *Young v. Kitchin*, L. R. 3 Ex. D. 127.

It is not essential to a good counter-claim that it should shew a claim to an amount equalling the plaintiff's claim, *Mostyn v. The West Mostyn Coal and Iron Co. (Limited)*, L. R. 1 C. P. D. 145.

A defendant must not set up by way of counter-claim against the claim of the plaintiff suing only in a distinct personal character, claims against him personally and also as an executor, *Macdonald v. Carrington*, L. R. 4 C. P. D. 28.

In an action tried by a jury in which the plaintiff proves a claim, but a counter-claim of less amount is proved by the defendant, the plaintiff recovers judgment for the balance only, and if no order is made as to costs the defendant's right to costs must be decided with reference to that balance, and not to that amount of the claim proved, *Staples v. Young*, L. R. 2 Ex. D. 324; but see *Potter v. Chambers*, L. R. 4 C. P. D. 69.

Where the plaintiff proved a claim, and the defendant a counter-claim for a lesser amount, the defendant, in the absence of any order as to costs, was held entitled to the costs of proving his counter-claim, and of the issues so far as they related thereto, *Blake v. Appleyard*, L. R. 3 Ex. D. 195; but, in *Porter v. Chambers*, L. R. 4 C. P. D. 69, under similar circumstances, the Court refused to alter the finding of the jury for the purpose of giving the defendant costs upon his counter-claim.

Though under this rule, and Order XVIII., r. 9, the question whether a counter-claim shall be excluded is not so entirely in the Judge of first instance as to preclude an appeal, he has a discretion which will not be interfered with except in a very strong case, *Huggons v. Tweed*, L. R. 10 Ch. D. 359.

See all the cases as to counter-claim collected in notes to sec. 16, sub-s. 4 of the Act.

(c) Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

See Eng. R. Sup. C., O. XIX., r. 2; G. O. Chy. No 71.

"*Adjusting the costs.*"—The Court will generally leave to the taxing master the duty of distinguishing what parts are unnecessary, see *re Atkinson v. Pilgrim*, 26 Beav. 151; Chancery Con. Gen. Ord. LXXI. For form of direction to taxing master, see *Burchell v. Giles*, 11 Beav. 34; *Woods v. Woods*, 5 Ha. 231; *Hanslip v. Kitson*, 8 Jur. N. S. 835. By the next rule and by O. L., r. 8, the taxing officer has power to disallow unnecessary matter without any special reference in the decree or order.

"*Prolixity.*"—See notes to O. XXIII., r. 1.

G. XV.  
R. 2.

(d) The taxing officer shall have the like duty where the Court has not made such order.

### 127.

3. A defendant in an action may set-off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sound in damages or not.

(a) Such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim.

(b) But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

See Eng. R. Sup. C., O. XIX., r. 3.

"Any right."—By R. S. C., c. 50, ss. 119, 120, any number of pleas could be joined without leave, subject only to their being struck out if framed so as to prejudice, embarrass or delay the fair trial of the action. But leave was necessary to plead and demur at the same time (sec. 118). By O. XV., r. 21, no plea can be joined with a plea of not guilty by Statute. As to joining other defences with a plea or payment into Court, see notes to O. XXVI., r. 1.

"Set-off or counter-claim."—See notes to s. 16, sub-s. 4.

### 128.

4. Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved; such statement shall be divided into paragraphs, numbered consecutively; and each paragraph shall contain, as nearly as may be, a separate allegation; dates, sums and numbers shall be expressed in figures and not in words; signature of counsel shall not be necessary; forms similar to those in Appendix (D) hereto may be used.

See Eng. Sup. C., O. XIX., r. 4.

This is in substance a statement of the Chancery rule of pleading, see G. O. Chy., No. 122.

"As concisely as may be."—As to mere prolixity being a ground for striking out a pleading, see notes to O. XXIII., r. 1.

"Material facts, but not the evidence."—A bill in Chancery was at one time composed of nine parts; (1) The address to the person or persons holding the great seal; (2) The names and addresses of the persons complainant; (3) The statement



of the plaintiff's case, commonly called the stating part; (4) The charge that the defendant unlawfully confederated with others to deprive the plaintiff of his right; (5) The charging part; (6) The averment of jurisdiction, or the statement that the plaintiff has no remedy without the assistance of a Court of Equity; (7) The interrogating part; (8) The prayer for relief; (9) The prayer that process might issue requiring the defendants to appear and answer the bill; to which, sometimes, was added a prayer for a provisional writ such as an injunction or a *ne exeat regno*, for the purpose of restraining some proceedings on the part of the defendant, or of preventing his going out of the jurisdiction till he had answered the bill. And this part sometimes contained a prayer that some of the defendants, upon being served with a copy of the bill, might be bound by all the proceedings in the cause. The form of a bill underwent some modifications, and at the time preceding the Judicature Act might be said to consist of the first, second, third and eighth parts, above enumerated only, the charging part being, indeed, still occasionally inserted, but practically included in the stating part. The averment of jurisdiction was also still sometimes inserted, but it might also, when inserted, be considered as a portion of the stating part. The fourth, seventh and ninth parts were omitted. The prayer for an injunction or a *ne exeat regno* or that certain formal parties might be bound, upon being served with a copy of the bill, was inserted when it formed part of the relief adapted to the circumstances of the cases; but then it formed a portion of the eighth part.

Pleadings should now only consist of two parts, viz:—the statement of the material facts required by above rule, and the relief asked as required by O. XV., r. 9. The charging part of the bill should now be omitted. *Watson v. Rodwell*, 45 L. J. Chy. 745; *Hamner v. Flight*, 35 L. T. N. S. 127; 24 W. R. 346.

Under the Chancery form of pleading any defences to which special reply had to be made, were met by a statement in the bill, either as originally filed or by amendment setting out the contention of the defendant as a pretence on his part, and the reply which the plaintiff desired to make to such pretence. Under the Common Law system such reply was embodied in the replication. The Common Law practice has been adopted by the Judicature Act and rules, and it has been held that a plaintiff should not plead any facts in anticipation of a defence, but should set them up in his replication, *Earp v. Henderson*, L. R. 3 Ch. D. 254; *Hall v. Eve*, L. R. 4 Ch. D. 341.

A plaintiff in his statement of claim need not state under what particular form of action he is proceeding, nor in what particular legal relation he claims to stand to the defendant, *Hamner v. Flight*, 35 L. T. N. S. 127; *Metropolitan Railway v. Defries*, 36 L. T. N. S. 150.

Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts they shall be stated as far as may be separately and distinctly, r. 10. The prayer however must be put at the end of all, and facts stated in a pleading need not be assigned to any particular part of the prayer, *Watson v. Hawkins* 24 W. R. 884.

No averment which is scandalous must be introduced, see O. XXIII., r. 1.

The plaintiff may in the body of his statement of claim set out inconsistent facts in support of inconsistent claims for relief, see O. XII., rr. 1 & 2, *Honduras v. Lefevre*, L. R. 2 Ex. D. 301; *Child v. Stenning*, L. R. 7 Ch. D. 413, *Bagot v. Easton*, L. R. 7 Ch. D. 1.

In an action for the recovery of land of which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the persons under whom he claims; and a general statement that by assurances, wills, documents and Crown grants in the possession of the plaintiff, without further describing them, the plaintiff is entitled to the land is embarrassing and liable to be struck out, *Phillips v. Phillips*, L. R. 4 Q. B. D. 127; but see notes to O. XXIII., r. 1.

A claim alleged that the defendant wrote and sent to a chief constable letters charging the plaintiff with a murder, and required his arrest; also that the defendant sent to a superintendent of police charging the plaintiff with the murder, and required his arrest, and that the superintendent, in consequence, endeavoured to arrest the plaintiff on several occasions, but was unable to meet with him, that the defendant had no reasonable or probable cause for making the charge, and the same was false, and made maliciously, and with intent to injure the plaintiff, whose credit and reputation were thereby injured. Held, on demurrer, that the



**O. XV.  
R. 4.**

claim was bad; because, if it was for libel or slander, the defamatory words were not set out as they ought to be; if for malicious prosecution, none had been instituted before a judicial officer, *Harris v. Warre*, L. R. 4 C. P. D. 125.

Where in an action in the Common Law Divisions the defendant relies upon such a defence as before the Judicature Act was deemed equitable, he is entitled (subject to the modifications introduced by that Act) to state the facts in his pleading in such manner as they might have been stated in an answer to a bill in the Court of Chancery; and a defence stating many distinct facts which, taken as a whole, would in Equity have constituted ground for relief against the action, is not liable to be amended or struck out as embarrassing under this rule, *Heap v. Marris*, L. R. 2 Q. B. D. 630.

A plea to an action on a contract that the plaintiff was suing on his own behalf, whereas he made the contract as agent for a company, will not be struck out as embarrassing, *Golding v. The Wharton Salt Works Co.*, L. R. 1 Q. B. D. 374.

Charges and statements which would not have been improper under the former system may nevertheless be struck out under the Judicature Act, *Watson v. Rodwell*, L. R. 3 Ch. D. 380.

As to striking out embarrassing pleadings, see notes to O. XXIII., r. 1.

The Chancery and Common Law rules of pleading as to the effect of not denying an allegation in the previous pleading were directly opposed to each other. The Chancery system provided that the silence of any pleading as to any allegation in the previous pleading was not to be taken as an admission of its truth (G. O. Chy. No. 123), while by the Common Law every allegation not denied was not placed in issue. The Judicature Act and rules in England adopt the Common Law system (O. XIX., r. 17). The Ontario Act and rules follow the Chancery practice (O. XV., r. 24).

*Inconsistent defences.*—See notes to O. XV., r. 10.

*"Forms similar to those in the Appendix."*—The forms of defence are in almost all cases copies of those given in the appendix to the English Act and deny specifically the various allegations of the statement of claim, see Forms Nos. 44, 46, 55, 57, 60, 73. This fact, considered with O. XV., r. 23, may leave some doubt as to the necessity of making a specific denial under circumstances similar to those given in the forms. See, however, notes to this rule *ante*.

*"Not the evidence."*—This rule applies to admissions as well as to other evidence, *Davy v. Garrett*, L. R. 7 Ch. D. 473; *Askew v. N. E. Ry. Co.*, W. N. (1875) 238; and see *Blake v. Albion*, 24 W. R. 677.

## 129.

5. Every pleading may be either printed or written, or partly printed and partly written, but no more than 4 copies of any pleading or other document are to be allowed to any party in a cause or matter, exclusive of the draft, but inclusive of all other copies that may be required, or made, in the progress of the cause.

See Eng. R. Sup. C., O. XIX., r. 5; G. O. Chy., Nos. 66, 403.

*"Inclusive of all other copies."*—Does this include copies for briefs? Such copies were expressly included in the Chancery Order No. 403.

## 130.

6. If more than 3 copies, exclusive of the draft, are required of any pleading or other document, the party may have the pleading or document printed for the purposes of the cause or matter, and in that case he shall in lieu of all charges for copies

be allowed 30 cents per folio of the pleading or document, and his reasonable disbursements of procuring the same to be printed. **O. XV. R. 6.**

See Eng. R. Sup. C., O. XIX., r. 5; G. O. Chy. No. 404.

"30 cents per folio."—The present taxing officer of the Court of Chancery holds that this amount is to be taken not only "in lieu of all charges" for making the copies, but covers also all attendances in connection with the printing. His predecessor thought differently.

### 131.

7. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor; but if no appearance has been entered for any party, then such pleading or document shall be delivered by being posted up in the office from which the writ of summons was issued.

See Eng. R. Sup. C., O. XIX., r. 6.

A notice of motion for a judgment is a document which may be delivered in case a defendant does not appear, by posting it up pursuant to this rule, *Dymond v. Croft*, L. R. 3 Ch. D. 512; *Morton v. Miller*, *ib.* 516; *Parsons v. Harris*, L. R. 6 Ch. D. 694.

### 132.

8. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is filed, and with the reference to the Division to which the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent (if any) of the party filing the same, or the name and address of the party filing the same if he does not act by a solicitor.

See Eng. R. Sup. C., O. XIX., r. 7.

"Marked."—See the Forms, No. 38, *et seq.*

"Filed."—The word "delivered" occupies a corresponding place in the English rule.

### 133.

9. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counter-claim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall shew it.

See Eng. R. Sup. C., O. XIX., r. 8.

"Alternative."—See notes to O. XII., r. 1.

## 134.

O. XV.  
R. 10.

10. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counter-claim founded upon separate and distinct facts.

See Eng. R. Sup. C., O. XIX., r. 9.

"*Several distinct claims.*"—See O. XIII., rr. 1-9.

"*Distinct grounds of defence.*"—As to a plea of payment into Court, see O. XXVI., r. 1.

*Set-off or counter-claim.*—The English rule (O. XIX., r. 10.) which provides when any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall in his statement of defence, state specifically that he does so by way of set-off or counter-claim, is not a part of the Ontario rules.

## 135.

11. Where the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material.

See Eng. R. Sup. C., O. XIX., r. 24.

"*Precise words.*"—In actions for libel or slander, the precise words complained of must be set out, *Harris v. Warre*, L. R. 4 C. P. D. 125; *Bradlaugh v. the Queen*, L. R. 5 Q. B. D. 607. In actions for the construction of wills the precise words are often necessary.

## 136.

12. Where it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred.

See Eng. R. Sup. C., O. XIX., r. 25.

## 137.

13. Where it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice is material.

See Eng. R. Sup. C., O. XIX., r. 26.

"*Material to allege notice.*"—A bill setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant is not demurrable, for want of a charge that the latter had notice of the fraud at, or before, he received his mortgage. It is for the defendant in such case to set up the defence of no notice, *Kitchen v. Kitchen*, 16 Gr. 232.

O. XV.

R. 13.

### 138.

14. Where any contract or any relation between any persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail; and if in such a case, the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative.

See Eng. R. Sup. C., O. XIX., r. 27.

For an example of a statement of claim authorized by this rule, see Forms, No. 43.

"*In the alternative.*"—Cunningham & Mattinson suggest that the proper course to adopt is to state the essential facts, and then to state that the party would contend that so-and-so was the contract which resulted from these facts, or, in the alternative, that—state the other possible contract which was the contract produced.

### 139.

15. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

See Eng. R. Sup. C., O. XIX., r. 28.

For examples, see Forms, Nos. 45 & 53.

Pleadings under the Judicature Act are to be statements of facts: therefore a plaintiff need not state under what form of action he is proceeding, nor in what particular legal relation he claims to stand to the defendant. Those are inferences of law for the Court to draw from the facts as admitted on the pleadings or proved at the trial, *Lord Hanmer v. Flight*, 24 W. R. 346.

[*E.g.*—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

### 140.

16. If either party wishes to deny the right of any other party to claim as executor, or as trustee, or as assignee in insolvency, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm,

O. XV.  
R. 18.

he shall deny the same specifically, or the same will be taken to be admitted.

See Eng. R. Sup. C., O. XIX., r. 11.

In *McEdwards v. McLean*, 43 U. C. R. 454, to an action by an official assignee, the defendant filed a plea denying the goods to be the goods of the plaintiff as such assignee :—Held, not to put in issue the plaintiff's official character as assignee.

### 141.

17. Where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

See Eng. R. Sup. C., O. XIX., r. 23.

"*Statute of Frauds*."—The effect of O. XV., r. 17, is to require that, in all cases where a party intends to rely on the illegality or insufficiency in law of a contract, whether with reference to the Statute of Frauds or otherwise, he must specially plead such illegality or insufficiency; and it is not sufficient to traverse allegations of the opposite party made in anticipation of objections to the contract upon such grounds, *Clarke v. Callow*, 46 L. J. C. L. 53. In that case, Mellish, J., said :—"Before the passing of the Judicature Acts, there was a difference between the practice at law and the practice in equity, in cases like the present. At law, if the contract was denied, it was a matter of evidence whether the contract were one which could be sued upon, or whether the remedy was barred by the Statute; but in equity, if the defendant intended to rely upon the Statute of Frauds, or any other special Statute, he was compelled to make a specific averment of his intention. The 23rd rule of the 19th order (Ont., O. XV., r. 17) was intended to introduce in all the Courts the practice of the Court of Chancery, and I see no reason why the rule should not apply in this case, notwithstanding the allegation by the plaintiff of acceptance and receipt, and the denial of that allegation by the defendant."

The above rule is an alteration of the former rule of pleading, by requiring that the legality or sufficiency in law of any contract, whether with reference to a Statute or otherwise, shall be expressly traversed.

The statement of claim, in an action for specific performance, stated that the predecessor in title of the plaintiff, by his agent, lawfully authorized, signed an agreement with H., the predecessor in title of the defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that H., the predecessor in title of the defendant, was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by H., or by any person by him lawfully authorized :—Held, that under the statement of defence the defendant could only enter into evidence to shew the unsoundness of mind of H., and could not enter into evidence to shew that the agent was not duly authorized, *Byrd v. Nunn*, L. R. 7 Ch. D. 284.

A defence founded on the Statute of Frauds cannot now be raised by demurrer, *Catling v. King*, L. R. 5 Ch. D. 660; affirmed in *Shardlow v. Cotterill*, W. N. (1881) 2.

### 142.

18. No plea or defence shall be pleaded in abatement.

See Eng. R. Sup. C., O. XIX., r. 13.

A plea in abatement in a common law action was a plea which, without disputing the cause of action alleged, stated facts shewing that the plaintiff could not properly recover in the action as brought. Such a plea was generally founded upon some personal disability of parties, or upon defect of parties (*vide Wilson's J. A.* 197).

See also O. XII., r. 15.

## 143.

19. No new assignment shall hereafter be necessary or used. **O. XV.**  
But everything which has heretofore been alleged by way of **R. 19.**  
new assignment is hereafter to be introduced by amendment of  
the statement of claim.

"*New Assignment.*"—A new assignment is a form of pleading which sometimes arose from the generality of the declaration, when, the complaint not having been set out with sufficient precision, it became necessary from the evasiveness of the plea to reassign the cause of action with fresh particulars, Wharton's Law Lexicon, 641. The necessity for a new assignment generally arises in two ways, *First*, where the plaintiff complains of one of several trespasses, in a form so general that it is applicable to any of them, and a trespass in respect of which the action is not brought is either by mistake or design, justified by the defendant; *Secondly*, where the defendant pleads justification of the trespass complained of, but the plaintiff maintains that there has been an excess beyond what the circumstances justify. One object of a new assignment is to make certain what the plea has rendered uncertain; as where the defendant mistakes the nature of the plaintiff's demand, and pleads a good answer to something which is not the cause of action sued upon, Harrison's Com. Law Pro. Act (2nd ed.) 149.

By the Com. Law Pro. Act, R. S. O., c. 50, s. 123, one new assignment only was allowed to any number of pleas to the same cause of action.

## 144.

20. No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

See Eng. R. Sup. C., O. XIX., r. 15; R. S. O., c. 40, s. 37; c. 51, s. 14.

Prior to this rule it was not necessary to state that the defendant was in possession, a mere appearance put the plaintiff to the proof of his title.

"*Hereinbefore provided.*"—This does not include rule 23 of this order, which requires every defence to be raised which if not raised would be likely to take the opposite party by surprise.

## 145.

21. Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. But if the defendant so plead he shall not plead any other defence without the leave of the Court or a Judge.

See Eng. R. Sup. C., O. XIX., r. 16; Reg.-Gen. T. T. (1856) No. 21 (Ont.)

"Not guilty by Statute" is a plea of the general issue by a defendant in a civil action when he intends to give special matter in evidence by virtue of some Act or Acts of Parliament.



O. XV.  
R. 21.

In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of the plea "by Statute" [or "according to the Statute"] (Robertson v. Cooley, *et al.*, 7 U. C., R. 21), together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise—otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament, and such memorandum shall be inserted in the margin of the issue and of the *Nisi Prius* record, Reg.-Gen., T. T. (1856) No. 21 (Ont.)

### 146.

22. Admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the pleading to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions: thus—"the defendant admits the allegations made in the first, second and third paragraphs of the plaintiff's claim."

See G. O. Chy. 125. 151.

In Chancery it was usual to insert a paragraph in the answer as follows:—"All admissions herein made are so made for the purpose of this suit only." The admissions may be made thus:—"The defendant admits the allegations made in the first, second and third paragraphs of the plaintiff's claim." By O. XXVIII., r. 1, each party is to admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice by his own statement or otherwise, that he admits, for the purposes of the action, the truth of the case generally, or of any part of the case stated or referred to in the statement of claim or defence of the opposite, or any other, party.

In an action for damages for an alleged infringement of the plaintiff's copyright in a song, the defendant by his statement of defence alleged that the song had not been registered at Stationers' Hall until the 9th of December, 1876, and added:—"The defendant denies that the song has been duly registered, the time of the first publication thereof is not truly entered in the register":—Held, that on this pleading the defendant was only entitled to prove that the time of the first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated, *Collette v. Goode*, L. R. 7 Ch. D. 842.

### 147.

23. Each party in any pleading, not being a petition or a writ of summons, must allege all such facts not appearing in the previous pleading (if any), as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not so raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as (for instance) fraud, or that any claim has been barred by the Statute of Limitations, or has been released.

See Eng. R. Sup. C., O. XIX., r. 18.

"Statute of Limitations."—In some cases under the Statute of Limitations the right of action merely is taken away, the right itself being left unaffected. In others the right also is taken away. This section applies to the former only, *Wakelee v. Davis*, 25 W. R. 60; *Dawkins v. Lord Penrhyn*, L. R. 6 Ch. D. 318.

148.

24. Save as above otherwise provided, the silence of a pleading as to any allegation contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation; and any allegation introduced for the purpose of preventing such implied admission, and not for the purpose of making intelligible the grounds of defence, is to be considered impertinent.

O. XV.  
R. 24.

See Eng. R. Sup. C., O. XIX., r. 21; G. O. Chy. No. 153; R. S. O., c. 50, s. 117.

This rule is the direct opposite of the English O. XIX., rr. 17 & 20, which are as follows:—Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition, *vide* Baxter's J. A., p. 219. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, Baxter's J. A., 220.

Prior to the Judicature Act it was a cardinal principle of Common Law pleading that every allegation which it was desired to put in issue must be specifically denied, and that every such allegation not denied was deemed to be admitted. In Chancery, however, the above rule was one of the General Orders of the Court. The English rule adopts the Common Law system; the Ontario adopts the Chancery. The English cases upon this point, therefore, will not apply in Ontario. The wide difference between the systems must be observed. Under the English it may be said that the defendant raises the issues which are to be tried; under the Ontario the plaintiff raises the issues. Plaintiff's counsel sometimes attempts to shield himself from difficulty by contending that "the defendant has not raised that point," and the answer usually given by V.-C. Blake is "You raised it yourself"—an answer which contains the pith of the Chancery system. What has been said, however, must be taken with this qualification, that each party "must allege all such facts not appearing in the previous pleading (if any), as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as (for instance) fraud, or that any claim has been barred by the Statute of Limitations, or has been released," O. XV., r. 23. It is not necessary to deny any allegation in the previous pleading in order that it may be put in issue, but if it is desired to raise any issue other than that intended by the previous pleading, then the facts raising such new issue must be pleaded.

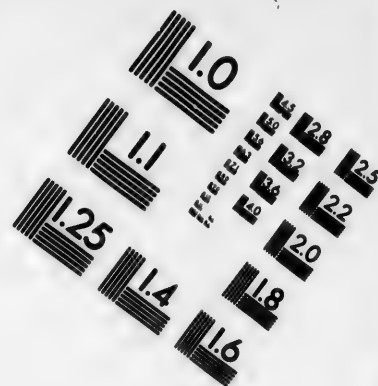
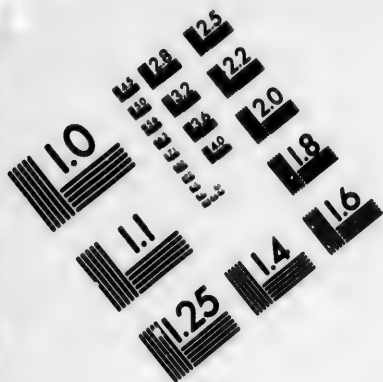
149.

25. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

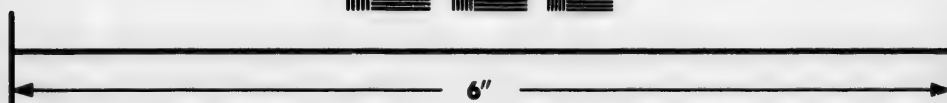
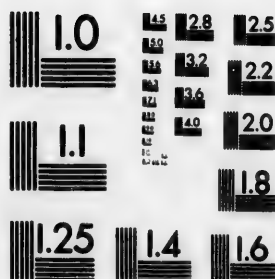
See Eng. R. Sup. C., O. XV., r. 25.

"Amendment."—As to powers of amendment, see O. XXIII.

"Inconsistent with the previous pleadings."—In Chancery it has been customary in amending the bill to make such changes as seem proper or advisable irrespective of the former allegations. But a complete change of the bill so as to raise an entirely new case was not permitted, *McGillivray v. Mackenzie*, 6 Pr. R. 56.



# IMAGE EVALUATION TEST TARGET (MT-3)



Photographic  
Sciences  
Corporation

23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4503

14 128  
13 132  
12 125  
11 122  
10 120  
9 118

10  
9  
8  
7  
6  
5  
4  
3  
2  
1

## 150.

O. XV.  
R. 26.

26. Delivering a statement of claim or defence or other pleading or proceeding, when mentioned or referred to in these Orders, includes filing, where, by the practice of the Courts heretofore or under these Orders, such statement, pleading or proceeding ought to be filed.

There is no English Rule corresponding to this.

## ORDER XVI.

## PLEADING MATTERS ARISING PENDING THE ACTION.

## 151.

O. XVI.  
R. 1.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence.

See Eng. R. Sup. C., O. XX., r. 1.

Between a plea of any matter arising after the commencement of an action as contemplated by this rule, and a plea of *puis darréin continuance* provided for by rule 3 of this Order, there is this difference, the latter must express the ground of defence to have arisen since the last plea, but the pleas here intended may express the ground of defence as arising after the commencement of the action, which may be at any time after writ issued and before plea pleaded.

The effect of this and the three following rules is the same as that of the rules, 22 & 23 as to Pleading of Trinity Term, 1856, *Foster v. Gamgee*, L. R. 1 Q. B. D. 666. These rules are as follows:—

Rule 22. A plea containing a defence arising after the commencement of the action, may be pleaded, together with pleas of defences arising before the commencement of the action; provided that the plaintiff may confess such plea and thereupon shall be entitled to the costs of the cause, up to the time of pleading such first mentioned plea.

Rule 23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea, pleaded by one or more only out of several defendants.

By the Common Law Procedure Act, R. S. O., c. 50, s. 106, "Any defence arising after the commencement of the action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action; see, as to this section, Harrison's Common Law Procedure Act (2nd ed.) 115.

A compromise of a suit having been entered into before answer, the defendant may set up the compromise in his answer, and pray, by way of cross relief, that it be specifically performed, and if the plaintiff does not diligently proceed with the suit, the defendant is entitled to move to dismiss for want of prosecution, *Small v. Union Permanent Building Society*, 6 Fr. R. 206.

After issue joined, one of two plaintiffs gave to the defendant a release, under seal, of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit:—Held, that the release should be pleaded, and that the defendant was not entitled to a stay of proceedings. The other plaintiff was allowed to strike out the name of the releasing plaintiff, and to amend the declaration, *McAlpine & Keen v. Carling*, 8 Pr. R. 171.

In the *Original Hartlepool Collieries Co. v. Gibb*, 46 L. J. Ch. 311, the Master of the Rolls gave it as his opinion that there could not be a counter-claim in respect of matter which arose after the issue of the writ, unless by leave of the Court: but, in *Ellis v. Munson*, 35 L. T. 585, the Court of Appeal, assuming that there could be such a counter-claim, decided that it should be pleaded as so arising, so that the plaintiff might be able to confess the plea and sign judgment for costs; and if it was not so pleaded, the plaintiff should take out a summons to strike it out, unless it be amended.

## 152.

2. If, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in reply, or be introduced by amendment into the statement of claim, within 3 weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge.

Eng. R. Sup. C., O. XX., r. 12; O. XXIV., r. 1; R. S. O. c. 50, s. 94; Eng. C. L. P. Act of 1852, s. 53; G. O. Chy., Nos. 149-155.

"*Introduced by amendment.*"—No order is required. The amendment is made upon filing an affidavit that the matter arose within eight days next before the day of making the amendment, O. XVI., r. 5.

"*Within 3 weeks.*"—As to computation of time see O. LII.

"*Last of the defences.*"—Under the former Chancery practice it was held that the expression "the last of several answers," meant the last of the several answers filed by several defendants, *Dalton v. Hayter*, 7 Beav. 586; *Lester v. Archdale*, 9 Beav. 156; and not the last answer filed at the time of application, *Arnold v. Arnold*, 9 Beav. 206; *Collett v. Preston*, 3 Mac. & G. 432.

"*Time shall be extended.*"—See O. XVI., r. 6; O. LII., r. 9.

"*Court or a Judge.*"—See notes to O. XVI., r. 6.

"*Costs.*"—Where the defendant, after pleading by leave of a Judge, withdraws his plea and pleads matter of defence arising afterwards, and the plaintiff confesses such plea, the plaintiff is entitled to his costs up to the time of pleading such plea, *Howard v. Brown*, 1 Ex. N. S. 694; and see rules of pleading, Trinity Term, 1856, Nos. 22 and 23.

## 153.

3. Where any ground of defence arises after the defendant has delivered his statement of defence, he may within 8 days after such ground of defence has arisen, deliver a further defence setting forth the same, or, introduce the same by amendment into his statement of defence.

See Eng. R. Sup. C., O. XX., r. 2; R. S. O., c. 50, ss. 106, 107; Reg. Gen. T. T. (1856), Nos. 22, 23 (Ont); Eng. C. L. P. Act of 1852, ss. 68, 69.

"*Within 8 days.*"—As to computation of time, see Order LII.

"*Deliver.*"—Delivery in this case includes filing, see O. XV., r. 26.

"*Amendment.*"—See O. XVI., r. 5; O. XXIII., r. 9.

O. XVI.  
R. 4.

## 154.

4. Where a ground of defence to any set-off or counter-claim arises after the expiration of 3 weeks from the time of delivering the defence or the last of the defences, the plaintiff within 8 days after such ground of defence has arisen, may deliver a further reply setting forth the same, or may introduce such new ground of defence into his statement of claim by amendment.

See Eng. R. Sup. C., O. XX., r. 2.

"*Expiration of 3 weeks.*"—"Within 8 days."—As to computation of time, see Order LII.

"*Last of the defences.*"—See note to Order XVI., r. 2.

"*Deliver.*"—Delivery includes filing, O. XV., r. 26.

"*Amendment.*"—See O. XVI., r. 5; O. XXIII., r. 9.

## 155.

5. In any such case the amendment of the pleading filed may be made without an order, on filing a *præcipe* and an affidavit that the matter of the amendment arose within 8 days, next before the day of the making of such amendment.

See R. S. O., c. 50, s. 107.

"*Amendment.*"—as to mode of making amendment, see O. XXIII., r. 9.

"*Within 8 days.*"—As to computation of time, see O. LII.

## 156.

6. In cases not provided for by the preceding rules, the leave of the Court or a Judge to amend the statement of claim or defence, or to deliver a further defence or reply, is to be obtained on notice supported by affidavit.

See Eng. R. Sup. C., O. XXVII. rr. 5, 6.

"*Court or a Judge.*"—Can the application be made in Chambers or before a County Judge or Local Master, see O. IV., r. 1 (a). Observe that the application is to be "on notice," and while applications in Court or in Chambers are made on notice, O. XLVII., r. 1; O. XLVIII., r. 1, applications to a County Court Judge or Local Master are upon summons, O. XLIX., r. 11.

\* See O. XXIII., r. 1, and notes as to the exercise of discretion in granting or withholding leave to amend.

## 157.

7. Where any defendant, in his statement of defence, whether by way of amendment or otherwise, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence; which confession may be in the Form No. 17 in Appendix (B) hereto, with such variations as circumstances may require; and



he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order. O. XVI.  
R. 7.

See Eng. R. Sup. C., O. XX., r. 3.

In an action for rent and for damages for breach of covenant in not building a wall, claiming also an injunction, the defendant paid money into Court to satisfy the claim for rent, and pleaded performance of the covenant by building the wall after the commencement of the action, and paid into Court £1 in respect of the breach before action. The plaintiff took the money out of Court, confessed "the defence" as to the wall, and claimed costs under this rule:—Held, that he was not entitled to costs, for the statement did not amount to a "defence" within the meaning of the rule, but that he was entitled to the costs of the action under Order L., *Callander v. Hawkins*, L. R. 2 C. P. D. 592; and see *Spurr v. Hall*, L. R. 2 Q. B. D. 615. See also as to confessing and signing judgment for costs, *Champion v. Formby*, L. R. 7 Ch. D. 373; *Newington v. Levy*, L. R. 5 C. P. 607; L. R. 6 C. P. (Ex. Ch.) 108.

If the plea go to part only of the action, the plaintiff may enter a *nolle prosequi* or discontinuance; but if he reply or demur, and the defendant succeed, the defendant will be entitled to his costs up to the time of pleading, *Lyttleton v. Cross*, 4 B. & C. 117.

For form of judgment, see Forms, No. 165.

## ORDER XVII.

### STATEMENT OF CLAIM.

#### 158.

1. The delivery of statements of claim shall be regulated as follows:— O. XVII.  
R. 1.

(a) If the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within 3 months from the time of the defendant's entering his appearance.

See R. Sup. C., O. XXI., r. 1 (a); R. S. O., c. 50, s. 93.

"*Shall not state.*"—The statement is made at the foot of the appearance, see Forms, Nos. 77, 78, 80.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*Deliver.*"—Delivery includes filing, O. XV., r. 26.

"*Within 3 months.*"—As to computation of time, see O. LII. In default of delivery within this period the defendant may apply to dismiss the action for want of prosecution, O. XXV., r. 1.

Upon such an application the plaintiff was given one week's further time upon payment of costs, *Higginbotham v. Aynsley*, L. R. 3 Ch. D. 288.

● XVII.  
R. 1.

In *Canadian Oil Works Corporation v. Hay*, W. N. (1878) 107, the writ was issued on the 11th of August, 1877, but not served till the 12th of February, 1878; the transactions complained of by the plaintiff took place in 1871. The writ being issued kept the right of action from being barred by the Statute of Limitations. The statement of claim was, by a mistake of the clerk of the plaintiff's solicitor, served two days after the expiration of the time limited for such service. The Vice-Chancellor held that such an action ought not to be barred by a mere slip, and gave the plaintiffs liberty to deliver the statement of claim notwithstanding the lapse of time.

The Court has no jurisdiction, however, to extend the time for renewing a Writ of Summons where the plaintiff's claim would, in the absence of such renewal, be barred, *Dyce v. Kauffman*, L. R. 3 Q. B. D. 7, 340.

This rule is not to be found among the English rules, & its object is not quite apparent. When the writ was issued "a copy of such writ and of all indorsements thereon, signed by or for the solicitor hearing the same or by the plaintiff if he sued in person," was filed, O. III., r. 15, unless indeed the substitution in that rule of the word "may" for the word "shall," in the corresponding English rule, reduces it to a nullity. The words "if not filed already," used in rule 2 of this order, were probably intended to have been inserted here also.

(b) If the defendant shall state that he does not require the delivery of a statement of claim, the plaintiff shall file a copy of the summons with all indorsements thereon within the same time.

(c) The plaintiff may, if he think fit, deliver a statement of claim, with the writ of summons, or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than 3 months after the appearance has been entered, unless otherwise ordered by the Court or a Judge.

See Eng. R. Sup. C., O. 21, r. 1 (b).

"Notice in lieu of writ of summons."—The notice is served when the defendant is a foreigner resident out of the jurisdiction, O. II., r. 4.

"More than 3 months."—See O. XVII., r. 1 (a) and notes.

(d) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a Judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

See Eng. R. Sup. C., O. 21, r. 1 (c).

(e) The taxing officer shall have the same duty if no order is made by the Court or a Judge.

See Eng. R. Sup. C., Aug. 12, 1875, r. 18; O. L., r. 11, *post*.

## 159.

2. Where the writ is specially indorsed and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to file a copy of the writ, with a copy of the special indorsement thereon, if not filed already, and deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge shall order him to deliver a further statement.

(a) Such notice may be either written or printed, or partly written and partly printed, and may be in the Form No. 16 in Appendix (B) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim.

(b) When the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by such order shall be directed; and if no time be so limited then within the time prescribed by Rule 1 of this Order.

See Eng. R. Sup. C., O. 21, r. 4.

"*Specially indorsed.*"—See O. III., r. 5.

"*File a copy of the writ.*"—These words are not in the corresponding English rule; see notes to rule 1 (b) of this order.

"*As his statement of claim, a notice.*"—This notice will make the indorsement a pleading, and it may be demurred to, *Robertson v. Howard*, 26 W. R. 683.

"*Court or Judge.*"—See notes to O. IV., r. 1 (a).

"*A further statement—particulars.*"—Upon an application for a further statement, an order may be made either for a statement of claim or for particulars, *Cotton v. Housman*, 2 Charley's Cases (Chambers) 36; *Schomberg v. Zoebelli*, *Id.* The Courts have power, irrespective of statutory enactment, to direct delivery of particulars, *Bulnois v. McKenzie*, 4 Bing. N. C. 127; *Luck v. Handley*, 4 Ex. 496. *Regulaz Generales*, T. T., 1856, No. 20, requiring particulars to be delivered with a declaration on the common money and other general counts is, of course, superseded by the new practice. Nos. 21 & 22, however, are probably in force. They are as follows: (21) A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the Judge thinks fit, without the production of any affidavit. (22) A defendant shall be allowed the same time for pleading after the delivery of particulars, under a Judge's order, which he had at the return of the summons, unless otherwise provided for in such order.

A special indorsement does not bind the plaintiff after delivery of his statement of claim, and will not operate as particulars of his claim. Particulars may therefore be ordered although the indorsement is sufficiently specific, *Huggins v. Guelph Barrel Co.*, 8 Fr. R. 170.

The rule which formerly existed, not to compel a plaintiff to state the items of sums for which he has voluntarily given credit to the defendant in his particulars of demand is, since the Judicature Act, no longer applicable, and the defendant can require the plaintiff to state such items, unless they are such as may be more within the knowledge of the defendant than of the plaintiff; therefore, where, in an action on a builder's contract, the plaintiff, in his particulars, on a specially indorsed writ, gave credit to the defendant for a lump sum, "for work not performed," and

**O. XVII.**  
**R. D.**

for another lump sum "for bricks, goods and work," the Court held that the defendant was entitled to have an account with dates and items as to these two lump sums, *Godden v. Corsten*, 49 L. J. C. L. 112.

The administratrix of A, by statement of claim in an action against the administratrix of G, alleged that an arrangement had been made between A and G that sums contributed by them for the purpose of being lent to or applied for the benefit of C, to enable him to carry on a litigation, should be treated as a joint transaction, and that as soon as C had established his title to the property for which he was suing, and could repay the advances made him, the advances made by A and G should be paid out of the moneys recovered from him; that, during the litigation, A advanced, in pursuance of this arrangement, sums amounting to about £27,000; that the advances made to C were made through G, and in his name; that the defendant had recovered a judgment against C for the advances to him, and that a sum had been set apart in a suit in Chancery in satisfaction of this judgment. The plaintiff claimed that it might be declared that the loans by G, in respect of which the judgment was recovered, were transactions for the joint benefit of A and G, as partners, and to have the sums contributed by them respectively ascertained; and asked that the plaintiff might be declared entitled to a share in the benefit of the judgment and in the fund set aside to satisfy it. The defendant, before putting in a defence, applied for an account, with dates and items of the particulars of the £27,000 mentioned in the statement of claim, and Pollock, B., made an order accordingly:—Held, on appeal, that the action not being a mere legal demand for an ascertained sum, but an equitable claim for an amount to be ascertained by an account, the particulars asked for were not required to enable the defendant to frame her defence, and that the plaintiff ought not to be ordered to furnish them, *Augustinus v. Nerinckx*, L. R. 16 Ch. D. 13. See cases as to Particulars in *Robinson & Joseph's Digest*.

## ORDER XVIII.

### DEFENCE.

#### 160.

**O. XVIII.**  
**R. 1.**

1 Where a statement of claim is delivered to a defendant he shall deliver his defence within 8 days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge.

See Eng. R. Sup. C., O. XXII., r. 1; R. S. O., c. 50, ss. 100, 101; c. 51, s. 3; G. O. Chy., Nos. 88, 89, 408, 620; Eng. C. L. P. Act of 1852, s. 63.

"*Deliver*."—Delivery includes filing; O. XV., r. 26.

"*Within 8 days*."—As to computation of time, see O. LII.

"*Time limited for appearance*."—Under O. XVII., r. 1 (c), the plaintiff may deliver a statement of his claim at the time of service of the writ. If the writ is served in Ontario, the time for appearance is 10 days, O. II., r. 5; if out of Ontario, it is as prescribed by O. VII., r. 2.

"*Unless such time is extended*."—The Court or a judge has power to extend or abridge the time; O. LII., r. 9.

By the Common Law Procedure Act, R. S. O., c. 50, ss. 100, 101, the time for a defendant within the jurisdiction pleading in bar was eight days. In Chancery a defendant had to answer or demur within one month after service of the bill, *Chancery Con. Gen. O. 88*.

An application for further time to answer is not of course, but must be supported by affidavit, *Brown v. Lee*, 11 Beav. 162; *Byng v. Clark*, 13 Beav. 92; *York and Midland Railway Company v. Hudson*, 13 Beav. 69.

An application for further time to plead should be made before the time when plaintiff would be entitled to sign judgment, *Cumberledge v. Carter*, 6 M. & G. 748. But if the summons be returnable before judgment signed, judgment signed while the parties are attending the Judge would be irregular, *Abernethy v. Paton*, 6 Scott, 586; *Glen v. Lewis*, 8 Ex. 132.

If the time for defence is extended generally, without limiting a shorter time for demurring alone, the defendant may demur after the time allowed by O. XXIV., r. 3, and if it is desired to limit the time for "demurring alone" the order should be so expressed, *Hodges v. Hodges*, L. R. 2 Ch. D. 112; but see *Boulton v. Cameron*, 2 Ch. Ch. 11. 41. If the plaintiff consents, in writing, to grant a defendant an extension of time for the delivery of his defence, an order for the purpose is unnecessary, *Ambrose v. Evelyn*, L. R. 11 Ch. D. 759; O. LII., r. 5.

Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being closed within the meaning of O. XXI., and O. XXXI., r. 2. A defendant's proper course under such circumstances is to write to the plaintiff's solicitor, and inquire how the action stands as regards the other defendants, *Ambrose v. Evelyn*, L. R. 11 Ch. D. 759.

### 161.

2. A defendant, who has appeared in an action and stated that he does not require the delivery of a statement of claim and to whom a statement of claim is not delivered, may deliver, a defence at any time within 8 days after his appearance, unless such time is extended by the Court or a Judge.

See Eng. R. Sup. C., O. XXII., r. 2.

"*Stated.*"—The statement is made at the foot of the appearance. See Forms No. 77, 78, 80.

"*Within 8 days.*"—As to computation of time, see Order LII.

"*Unless such time is extended.*"—See notes to preceding rule.

"*Court or a Judge.*"—See notes to preceding rule.

### 162.

3. Where leave has been given to a defendant to defend under Order 10, Rule 1, he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within 8 days after the order.

See Eng. R. Sup. C., O. XXII., r. 3.

"*Deliver.*"—Delivery includes filing, O. XV., r. 26.

"*Within 8 days.*"—As to computation of time, see O. LII.

### 163.

4. Where the Court or a Judge shall be of opinion that any allegations of fact denied or not admitted by either or any party ought to have been admitted, the Court may make such

**G. XVIII.**  
**R. 4.**

order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

This is an extension of the practice in Chancery on references under decrees. Where it becomes necessary to adduce evidence, or to incur expenses otherwise, in establishing or proving items of account, or other matters which in the judgment of the Master ought, under all the circumstances, to have been admitted by the party sought to be charged therewith; and which the party has refused to admit; the Master before making his report is to proceed to tax such costs, occasioned by such refusal, as shall appear to him reasonable and just, and shall state in his report the amount of such costs, and how the same were occasioned, Chancery Con. Gen. Ord. 234.

As to costs occasioned by a party neglecting or refusing to admit documents at Common Law, see Harrison's C. L. P. A. 277; and in Chancery, G. O. Chy. No. 156.

**164.**

5. Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

See Eng. R. Sup. C., O. XXII., r. 5.

"Counter-claim."—See notes to sec. 16, sub-s. 4.

In Form No. 67, the style of cause in a counter-claim where no third person is brought in as a defendant to it, is given thus:—

Between, A. B., Plaintiff,  
and  
C. D., Defendant,  
(By original action).  
and Between, C. D., Plaintiff,  
and  
A. B., Defendant,  
(By Counter-claim).

Where no "other person" is brought in by the counter-claim, it was said by Quain, J., in *Williams v. Wright*, W. N. (1875) 232, to be utterly wrong to add a further title. "The new procedure recognizes the party setting up a counter-claim in no other light than as a defendant. The heading of the Liverpool firm is simply absurd."

"To such of them as are parties."—There may be a counter-claim as against co-defendants, *McLay v. Sharp*, W. N. (1877) 216; *Bagot v. Easton*, L. R. 11 Ch. D. 392; *Butler v. Butler*, 49 L. J. N. S. Chy. 742.

**165.**

6. Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore

contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 19 in Appendix (B) hereto, or to the like effect. **O. XVIII. R. 6.**

See Eng. R. Sup. C., O. XXII., r. 6.

"*The same rules.*"—See O. VI. and notes.

"*Form No. 19.*"—The time limited in the form for appearance is eight days. The time limited for appearance to a writ is ten days, when served within Ontario, O. II., r. 5, and various longer periods when served out of the jurisdiction, O. VII., r. 2.

### 166.

7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action.

"See Eng. R. Sup. C., O. XXII., r. 7.

This rule does not refer to the time for appearance, for the times limited are different. See note to preceding rule.

As to mode of appearance, see Order VIII.

### 167.

8. Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim.

See Eng. R. Sup. C., O. XXII., r. 8.

"*Counter-claim.*"—See notes to sec. 16, sub-s. 4.

"*Deliver.*"—Delivery includes filing, O. XV., r. 26.

"*Within the time.*"—See O. XVIII., r. 1.

### 168.

9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff, or any other person named in manner aforesaid as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time within 3 weeks from the delivery of such statement of defence, apply to the Court or a Judge for an order that such counter-claim may be excluded; and the Court or a Judge may, on the hearing of such application, make such order as shall be just.

See Eng. R. Sup. C., O. XXII., r. 9.

"*Counter-claim.*"—See notes to sec. 16, sub-s. 4.

"*An independent action.*"—Under O. XV., r. 3 (b), "the Court or a Judge" may on the application of the plaintiff before trial, if in the opinion of the Court or



**O. XVIII.**  
**R. 9.**

Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

For the cases shewing the discretion which has been exercised under this Order, see notes to sec. 16, sub-s. 4.

## 169.

10. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

See Eng. R. Sup. C., O. XXII., r. 10.

The "balance in favour of the defendant" in case a set-off or counter-claim is established against the claim, is the balance upon the hearing of the action, *Rolfe v. Maclaren*, L. R. 3 Ch. D. 106; no order can be made on a counter-claim before the principal claim of the plaintiff is dealt with, *Id.*

As to costs in such cases, see notes to sec. 16, sub-s. 4.

## ORDER XIX.

## DISCONTINUANCE.

## 170.

**O. XIX.**  
**R. 1.**

1. The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, filed and served, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint; and thereupon he shall pay the defendant's costs of the action, or if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn.

*Effect of Discontinuance.*—A plaintiff who had given an undertaking as to damages discontinued his action:—Held, that the Court would, nevertheless, direct a reference as to damages, *Newcomen v. Coulson*, L. R. 7 Ch. D. 764.

*Test action.*—Where an action which had been a test action (for the purpose of deciding the rights of the plaintiffs in a number of similar actions against the same defendants) came on for trial, the plaintiff declined to proceed, on the ground that he was not in a fit state of health to attend and be examined as a witness. On a previous occasion he had moved for and obtained a postponement of the trial, on the ground of his ill health. A week before the trial, an application by the plaintiff, in Chambers, to stay all proceedings in the action had been refused by Malins, V. C., on the ground that the plaintiff was not *dominus litis*, but a trustee for the plaintiffs in the other actions. At the trial the plaintiff asked for a postponement or that an order of discontinuance might be made under rules of Court (1875) O. XXIII.:—Held, that the Court could not regard the rights of the plaintiffs in the

other actions, but must act as if the plaintiff had not appeared at the trial, and **G. XIX.**  
must dismiss the action with costs, *Robinson v. Chadwick*, L. R. 7 Ch. D. 878. **22. 1.**

**Notice pending appeal.**—A plaintiff gave notice of appeal from the refusal of an injunction; shortly afterwards the plaintiff's solicitors wrote to the defendant's solicitors to withdraw the notice of appeal. Two days after this the plaintiff's solicitors gave the defendant's solicitors notice of discontinuance of action. The defendant's solicitors declined to consent to the withdrawal of the appeal except on terms to which the plaintiff's solicitors did not agree, and the appeal came on in its turn:—Held, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper, *Conybeare v. Lewis*, L. R. 13 Ch. D. 469.

**Counter-claim.**—A counter-claim does not interfere with the plaintiff's right to discontinue, *Vavasour v. Krupp*, W. N. (1880) 11.

**Forms.**—A form of notice of discontinuance is given among the Forms, see No. 29.

For form of judgment after discontinuance, see Forms, No. 164. A form of *feri facias* is given in *Bolton v. Bolton*, L. R. 3 Ch. D. 276. It appears to have been devised upon the assumption that no judgment was to be entered for the costs, and is based directly upon the notice of discontinuance. It is quite true, as said by counsel, that the rules contain no provision for signing judgment for costs, and that they do provide that "thereupon he (the plaintiff) shall pay the defendant's costs of the action," but the form of judgment is given in the Appendix D. 13, similar to the form in the appendix to the Ontario Rules, No. 164. This fact appears to have been overlooked, and probably destroys the value of the case as an authority for such an extraordinary writ.

**Costs.**—A bill had been filed but not served and was subsequently dismissed with costs by the plaintiff. It appeared that, though no answer had been drawn, the defendant's solicitor had received instructions to defend some two months before the dismissal of the bill:—Held, that the defendant was entitled to tax instructions and the costs of taxation, *Bissett v. Strachan*, 8 P. R. 211.

(a) Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

Eng. R. Sup. XXIII., r. 1.

**Discontinuance.**—Statement of practice as to taxation of costs of an abandoned motion, or on discontinuance of action, *Harrison v. Leutner*, L. R. 16 Ch. D. 559.

Hitherto in Chancery a plaintiff could at any time before the hearing of the cause obtain an order upon *præcipe* dismissing his bill with costs, to be paid by him to the defendant. But if such an order was taken out after the cause had been set down for hearing, it was equivalent to a dismissal upon the merits, *G. O. Chy.*, No. 184. After a cause had been heard, however, and was standing for judgment, plaintiff could not dismiss his bill on *præcipe*, *Smith v. Port Hope Harbour Company*, 6 U. C. L. J. 189.

At Common Law, Reg. Gen. T. T. (1856) No. 24, was as follows:—"To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay costs, and a consent that if they are not paid within four days after taxation the defendant shall be at liberty to sign judgment of *non pros*."

**"Filed and served."**—These words are not in the corresponding English rule. Under the English Act a letter was held a sufficient notice, *The Pommerania*, L. R. 4 P. D. 195.

**"Part or parts."**—A plaintiff under the former practice could not at Common Law discontinue part of an action, *Benton v. Polkingham*, 6 M. & W. 8.

(b) Save as in this Order otherwise provided, it shall not be competent for the plaintiff to withdraw the Record or discon-

**O. XIX.  
R. 1.**

tinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out.

See Eng. R. Sup. C., O. XXIII., r. 1.

In Chancery there was nothing equivalent to the withdrawal of the record, and notice of hearing having been once given there was no power to countermand it. At Common Law, on the other hand, notice of trial could, up to within four days of the trial, be countermanded with impunity, and the withdrawal of the record at any time prior to the trial subjected the plaintiff to payment of the costs of the day only. The Chancery practice in these respects has been adopted, for the withdrawal by leave of a Judge is equivalent to a postponement of the trial.

There is no limit placed by these rules upon the right of the plaintiff to withdraw a juror. But as the effect of so doing is to put an end to the action and determine the whole cause of suit (*Flake v. Clapp*, 8 Pr. R. 62), defendants cannot be injured by the omission.

And see cases in notes to O. XXXI., r. 19.

"*Court or a Judge*."—See notes to O. IV., r. 1 (a).

"*Such terms as to costs*."—A plaintiff has been allowed to dismiss his bill without costs under the following circumstances:—(1) If the bill was filed under a mistake common to both parties, *Broughton v. Lashmer*, 5 M. & C. 136; and see *Hansard v. Hardy*, 18 Ves. 460; (2) If the defendant has given the relief sought by the suit, *Wilde v. Wilde*, 10 W. R. 368, 503; or if the bill has become unnecessary, but was originally justified by the defendant's misconduct or fraud, *Elsev v. Adams*, 2 D. J. & S. 147; *Knox v. Brown*, 2 Bro. C. C. 186; *Goodday v. Sleight*, 3 W. R. 87; but see *Ventilation and Sanitary Improvement Company v. Eccleston*, 11 W. R. 613. (3) Where the plaintiff has been misled by a suggestion of the Court, *Lister v. Leather*, 1 D. & J. 361.

One of the defendant's to an action for the recovery of land was allowed to withdraw his defence, after the action had been on the paper for trial, but had been postponed till another action relating to the same property should be ready for trial, upon the terms of giving the plaintiffs all the relief to which they could be entitled at the trial, and paying the costs occasioned by the defence, and the costs of a summons for leave to withdraw, *Real and Personal Advance Co. v. McCarthy*, L. R. 14 Ch. D. 188.

(c) The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

See Eng. R. Sup. C., O. 23, r. 1.

"*Court or Judge*."—See notes to O. IV., r. 1.

Some of several defendants to an action for recovery of land, after the action had been in the paper for trial, having quitted the part of the premises they occupied, were allowed to withdraw their statement of defence on terms of paying into Court *mesne* profits, and paying the costs occasioned by their statement of defence, and the costs of the summons for leave to withdraw, *The Real and Personal Advance Co. v. McCarthy*, 49 L. J. Ch. 615.

171.

2. Where a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties. O. XIX.  
R. 2.

See Eng. R. Sup. C., Dec. 1875, r. 9.

172.

3. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

See Eng. R. Sup. C., June 1876, R. 10; Reg. Gen. T. T. (1856) No. 24 (Ont).

See notes to rule 1 (a) of this order.

For form of judgment, see Forms, No. 164.

ORDER XX.

REPLY AND SUBSEQUENT PLEADINGS.

173.

1. A plaintiff shall deliver his reply, if any, within 3 weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge. O. XX.  
R. 1.

See Eng. R. Sup. C., O. XXIV., r. 1

"*A plaintiff*."—By O. XVIII., r. 8, any person named in a defence as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim. But such reply must not contain a counter-claim against the defendant, *Street v. Gover*, L. R. 2 Q. B. D. 498.

"*Deliver*."—Delivery includes filing, O. XV., r. 26.

"*Reply*."—A plaintiff is entitled to reply by traverse, confession or avoidance or both, *Hall v. Eve*, L. R. 4 Ch. D. 341. The reply under the new practice is equivalent to the reply under the former Common Law practice and matters of reply which would formerly have been raised by amendment of the bill in Chancery are now to be pleaded in the replication, *Ib.*; *Earp v. Henderson*, L. R. 3 Ch. D. 254. All the other matters formerly raised at law by a new assignment must now be introduced into the original statement by way of amendment, *Ib.*

A reply must not refer to an independent document, such as plaintiff's answer to interrogatories, as containing facts on which the pleader relies, without setting out such document itself as part of the reply, *Williamson v. London and North-western Railway Co.*, L. R. 12 Ch. D. 787; a reply must not set up new claims; it must not plead mere evidence, or argument, or state conclusions of law to be drawn or inferred from the facts pleaded, *Ib.* It is competent for a plaintiff to introduce new matter by way of set-off, or by way of controverting the statements of the defence, provided that he do so within a reasonable compass and in a reasonable manner, *Ib.*

"*Last of the defences*."—The expression "last of several answers," in G. O. Chy. No. 81, under which the plaintiff could obtain an order of course to amend

**O. XX.  
R. 1.**

within a certain time after the last answer was filed, was construed to mean "the last answer" required to be put in, *Dalton v. Hayter*, 7 Beav. 586; *Lester v. Archdale*, 9 Beav. 156; *Duncombe v. Lewis*, 10 Beav. 273; *Stinson v. Taylor*, 4 Ha. 608; and not the last answer filed at the time of applying for the order, *Arnold v. Arnold*, 9 Beav. 206; *Collett v. Preston*, 3 Mac. & G. 432; whereas, in *G. O. Chy. No. 273*, relating to motions to dismiss, the expression "last of the answers" meant the last answer of the particular defendant moving to dismiss, *Dalton v. Hayter*, 7 Beav. 586; *Lester v. Archdale*, 9 Beav. 156; *Sprye v. Reynell*, 10 Beav. 351.

*Forms.*—Forms of reply are given in the appendix, see Forms, Nos. 47, 52, 63, 66, 70. See as to forms of reply said to be erroneous, and in which the facts stated should have been introduced by amendment, into the statement of claim, *Earp v. Henderson*, L. R. 3 Ch. D. 261; *Hall v. Eve*, L. R. 4 Ch. D. 341.

## 174.

2. No pleading, subsequent to reply, other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

See Eng. R. Sup. C., O. XXIV., r. 2.

*"Joinder of issue."*—In Common Law pleading, when the pleadings in an action reach such a stage that either party traverses or denies the facts pleaded by his antagonist, and the latter, instead of seeking to avoid their effect, or pleading any new matter to rebut them, simply accepts the issue thus tendered, this is called joinder of issue or joining issue, *Abbott's Law Dictionary*.

*"Court or a Judge."*—See notes to O. IV., r. 1 (a).

## 175.

3. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within 4 days after the delivery of the previous pleading, unless the time shall be extended by the Court or a Judge.

See Eng. R. Sup. C., O. XXIV., r. 3.

*"Delivered."*—Delivery includes filing, O. XV., r. 26.

*"Within 4 days."*—As to computation of time, see O. LII.

*"Unless the time shall be extended."*—See O. LII., r. 8.

*"Court or a Judge."*—See notes to O. IV., r. 1 (a).

## ORDER XXI.

## CLOSE OF PLEADINGS.

## 176

**O. XXI.  
R. 1.**

As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further or other pleading thereto, or as soon as the time for amending

the pleadings under these Rules or under any order made in the action or for delivering a reply or subsequent pleading or demurrer, has expired, the pleadings as between such parties shall be deemed to be closed without any joinder of issue being pleaded by any or either party. **O. XXI. R. 1.**

See Eng. R. Sup. C., O. XXV.; O. XXIX., r. 12; R. S. O., c. 50, s. 117.

"*Joined issue.*"—See O. XX. r. 2.

"*Time for amending.*"—See O. XXIII.

"*Subsequent pleading or demurrer.*"—These words are not in the English rule and are not very clear. The word pleading includes demurrer. Is a subsequent demurrer meant? It could hardly have been intended that the rule should only apply in cases where the demurrer had, in the previous history of the action, been filed. If not a subsequent demurrer then it must mean after the time for delivering a demurrer has expired. This is the same time as for delivering a defence, O. XXIV., r. 3. If then no defence has been put in, and the time for demurrer has elapsed, are the pleadings closed?

"*Without any joinder of issue being pleaded.*"—This is another example of the danger of piecing new ideas on to old. The English rule reads thus: As soon as either party has joined issue upon any pleading of the opposite party, simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed, and is intelligible; the present rule in effect says that "as soon as either party has joined issue . . . the pleadings . . . shall be deemed to be closed without any joinder of issue being pleaded."

## ORDER XXII.

### ISSUES.

#### 177.

Where in any action it appears to a Judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge. **O. XXII. R. 1.**

See Eng. R. Sup. C., O. XXVI.

"*A Judge.*"—For definition of this word, see O. LXI.

In England the application is made in Chambers. Can it be so made in Ontario See notes to O. IV., r. 1 (a).

Separate issues will not be allowed to be tried unless they will be decisive of the action, *Republic of Bolivia v. Bolivian Co.*, 24 W. R. 361.



## ORDER XXIII.

## AMENDMENT OF PLEADINGS.

178.

O. XXIII.  
R. 1.

1. The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply; or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. All such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.

See Eng. R. Sup. C., O. XXVII., r. 1; R. S. O., c. 49, ss. 5, 8; c. 50, ss. 120, 270.

Amendments under this rule may be divided into two classes: (1) amendments by parties of their own pleadings, and (2) compulsory amendments of the pleadings of the opposite party. As to amendments by striking out or adding parties, see O. XII., rr. 2, 15.

*1. Amendments by parties of their own pleadings.*—Amendments may be made without leave in the cases provided for by rules 2-6 of this Order, and rule 7 provides for cases in which leave has first to be obtained. Some of the cases in which applications were made for leave are here noted. The valuable labours of Messrs. Rolinson & Joseph have rendered it unnecessary to attempt an exhaustive analysis.

*At what time amendments allowed.*—"The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply," O. XXIII., r. 1.

Application for leave to amend any pleading may be made by either party to the Court or a Judge in Chambers, or to the Judge at the trial of the action," O. XXIII., r. 7.

Under the old practice leave to amend at the trial would not be given unless the amendment related to the issues already raised, *Lord Darnley v. L. C. and D. Ry.*, 1 D. J. & S., 204, 215; *Gossip v. Wright*, 11 W. R. 632; or the position of the parties had been changed since bill filed, *Atty.-Gen. v. Cambridge*, L. R. 6 Eq. 282.

In *Woodstock v. Niagara*, 1 Ch. Ch. R. 166, an application for leave to withdraw replication and amend the bill by adding parties, where the cause had been set down for examination, and where the amendment would postpone examination till the following term, was refused with costs, the plaintiff having been guilty of laches in making the application.

An amendment of a bill after replication, and long after bill filed, for the purpose of stating a case of gross fraud, will not be allowed unless it appears on the clearest evidence that the plaintiff or his solicitor did not know, and could not with reasonable diligence have discovered, before filing the bill, the facts upon which the charge of fraud is grounded, *Kerr v. Finlayson*, 3 Ch. Ch. R. 497.

Under the Judicature Act leave was given to amend at the hearing of the suit on motion for decree so as to raise an entirely new case, *Budding v. Murdoch*, L. R. 1 Ch. D. 42; *Roe v. Davis*, L. R. 2 Ch. D. 729; but see *McGillivray v. McConkey*, 6 Pr. R. 56.

A plaintiff charged the defendants with wilful neglect and default, but did not allege any particular act of default. Issue having been joined in the suit before the 2nd of November, 1875, upon the cause coming on for hearing after that date, leave was given to the plaintiff, on his application, to amend the bill by charging some one or more acts of default, but on the terms that he should enter into no new evidence, and should pay the costs of the present hearing, *King v. Corke*, L.



R. 1 Ch. D. 57; see also *Roe v. Davies*, L. R. 2 Ch. D. 729; *Mozley v. Cowie*, 38 L. T. N. S. 908; *Kino v. Rudkin*, L. R. 6 Ch. D. 160. Even after the verdict, where necessary to give effect to the finding of a jury an amendment may be allowed, *Noad v. Murrow*, 40 L. T. N. S. 100, 3. Where there is a variance between the declaration and proof, the proper time to apply to amend the declaration is at the conclusion of the plaintiff's case. In *Rainy v. Bravo*, L. R. 4 P. C. 287, Sir Montagu Smith said:—"The appellant, according to the proper rule of practice, ought, in their Lordships' opinion, to have applied for the amendment at the end of his case. At the end of his case it must have been apparent that there was a variance between the evidence of the witnesses and the statement of the libel in the declaration, and then, before the Judge had pronounced his decision or had begun to consider his decision, was the proper time for the appellant to have applied to him for an amendment of the declaration. That, however, the appellant did not do, but took his chance of a decision on the materials which were then before the Judge. However, when the Judge, after having taken time to consider, was delivering his judgment and giving his reasons for it, the appellant then, perceiving that the judgment was to be against him, applied, for the first time, to the learned Judge to make the amendment. Their Lordships do not say that it was too late for the learned Judge to have exercised the power of amendment, if he had thought fit to do so; but it was a matter entirely within the discretion of the Judge at the trial, whether at so late a period he would make the amendment or not, and the Chief Justice on this occasion declined to make it, but offered the appellant the choice of a non-suit. The question really comes to this, whether the tribunal should now interfere with the discretion so exercised by the learned Judge in refusing to make the amendment. Their Lordships would be at all times most reluctant to interfere with the discretion of the learned Judge, in a case of this kind, when he has exercised it upon a full apprehension of all the circumstances before him."

*What amendments will be allowed.*—Leave will be given only in the interests of justice, and not for the purpose of raising technical points. In *Collette v. Goode*, L. R. 7 Ch. D., at p. 847, Fry, J., said:—"But I do not think I ought to allow an amendment for the mere purpose of enabling the defendant to raise a purely technical objection to the plaintiff's title to sue, an objection which the defendant never intended to raise, but of which he now adroitly seeks to avail himself;" see also *Noad v. Murrow*, 40 L. T. N. S. 100; *Corby v. Cotton*, 3 U. C. L. J. 50; *McKenzie v. Van Sickles*, 17 U. C. R. 226; *Mozley v. Cowie*, 26 W. R. 854; *Ashley v. Taylor*, 27 W. R. 228.

By not sufficiently denying an allegation, under the English practice, the defendant was held to have admitted it. Leave to amend by inserting a denial was at first refused, *Tildesley v. Harper*, L. R. 7 Ch. D. 403, but on appeal allowed, S. C.; L. R. 10 Ch. D. 393. In that case *Bramwell*, L. J., said:—"My practice has always been to give leave to amend, unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent, which could not be compensated for by costs or otherwise. I confess that if the present case had come before me I should have had some doubt whether the defendant had made a *bona fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to shew that the slip in the pleading was a *bona fide* one, and if satisfied on that point I should not have refused leave to amend. Mr. Justice Fry seems to have thought it right to trust to his own strong impression that the pleader could not have pleaded as he had done unless there had been *mala fides*, rather than to the positive affidavit of the defendant, who had sworn, before he knew, that any objection could be taken to the pleading, that he had not given any bribe. It is quite right that the rules of the Court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties."

Plaintiff having elected to occupy one of two positions, was not allowed to amend so as to claim under the other, *Cargill v. Bower*, L. R. 10 Ch. D. 502.

An action may by amendment of the writ and statement of claim be turned into an information and action without prejudice to a pending motion in the action, the necessary sanction of the Attorney-General being obtained, *Caldwell v. Pagham Harbour Reclamation Company*, L. R. 2 Ch. D. 221; see also *Duke of Sutherland v. Tunstall Board*, 21 W. R. 244.

A defendant who has put in a joint defence will be allowed, under this rule, to put in a separate and amended statement, alleging new grounds of defence, without

**O. XXIII.**  
**R. 1.**

any affidavit as to the nature of the new defence, but will be ordered to pay the costs rendered necessary by not having put in such a defence at an earlier period, *Cargill v. Bower*, L. R. 4 Ch. D. 78.

An action was brought against three defendants, claiming damages in respect of their alleged conspiracy and false representation. Before it came on for trial one of the defendants died. Administration was taken out to his estate. The plaintiff did not apply for an order of course to continue the proceedings against the administrator, but obtained, in Chambers, an order giving him leave to amend the writ and statement of claim, by adding the administrator as a defendant, and by making allegations that the estate of the intestate had been benefited by reason of the matters complained of in the action. The administrator was served with notice of the summons upon which this order was made, but did not appear on the hearing, and the order was drawn up on the production of an affidavit of service on him; the order, as drawn up, was dated as of a day prior to the date of the filing of the affidavit. The writ and statement of claim, having been amended, were served on the administrator, who entered a conditional appearance, and moved to discharge the order for irregularity:—Held, that the order had been regularly made under O. XXIII., r. 1, but that the order must bear date the day on which the affidavit was filed, *Ashley v. Taylor*, L. R. 10 Ch. D. 768.

No amendment will be allowed, the effect of which will be to make the pleading demurrable, *Bank of Upper Canada v. Ruttan*, 22 U. C. R. 451.

In a suit to set aside a settlement on the ground of fraud and surprise on the plaintiff, leave was given to amend by alleging also the incapacity of the settlor, *Roe v. Davies*, L. R. 2 Ch. D. 729.

A right obtained, subsequent to filing the bill, could not be introduced by amendment, *Atty.-Gen. v. Corp. of Avon*, 3 D. J. & S. 637; and see *Peek v. Spencer*, 5 Ch. App. 548. As to pleading matters arising, pending the action, see O. XVI.

*Material for motion.*—Prior to the Judicature Act, although the Court might at any time, under proper circumstances, permit an amendment of the bill in furtherance of justice, and upon such terms as it may think fit to impose, nevertheless, to obtain such indulgence, the plaintiff had to satisfy the Court by affidavit of the cause of the delay, that due diligence had been used in the prosecution of the suit, and of the truth of the amendments, *Kerr v. Finlayson*, 3 Ch. Ch. R. 497; see also *McNab v. Gwynne*, 1 Gr. 127; *Jackson v. Robertson*, 7 Pr. R. 148. Where the plaintiff had been delayed by the defendant's not obeying in proper time an order to produce, leave was given, *Archibald v. Hunter*, 2 Ch. Ch. R. 272. And where the plaintiff's solicitor absconded before the time to amend the bill had expired, had expired, and his departure was not known to the plaintiff afterwards, and due diligence appeared to have been used by the plaintiff afterwards with the cause, after becoming acquainted with such departure, the Court granted leave to amend on payment of costs, *Carney v. Bolton*, 1 Gr. 423.

Under the new practice amendments have been more liberally allowed. In *Cargill v. Bower*, L. R. 4 Ch. D. 80, Malins, V. C., said:—"The old practice has been referred to, which put in the way of both the plaintiff and defendant so much difficulty in amending the pleadings that it was always productive of great injustice. In order to remove that difficulty the new rules have entirely altered the practice. The case before me is one in which a gentleman, who is one of the defendants to a suit, put in a joint defence, and since he put in that defence he has consulted another solicitor, and the new solicitor says there are omissions of several important grounds of defence. Now it is clear that there may be omissions made by a solicitor in putting in a defence which the client, who is ignorant of the law, may not have been able to detect, and surely the mistake of a solicitor should not deprive him of putting in a new defence when another solicitor has discovered the omissions in the first defence within due time before the hearing of the action. I see no possible harm which can arise from allowing the amendment to be made." And in *Chesterfield Company v. Black*, 25 W. R. 409, Bacon, V. C., said:—"I am not competent to repeal the Judicature Acts, and if I were I should be unwilling to do so. By the provisions of these Acts I am relieved from the necessity of inquiring into the materiality of the proposed amendment. I think the enlarged power given to the Court by the Judicature Acts is one of the most useful and beneficial which has ever been conferred on the Court. It is against justice that a man should not be at liberty to bring his case forward in the way he thinks best, or that he should be precluded from bringing before the Court those materials which he considers necessary for the proper prosecution of his case. I do not think it was the inten-

tion of the Act that the old qualification should apply. In this case, until a recent period, the plaintiffs did not know of certain documents affecting the subject matter of the action. These documents have been laid before counsel, and under his advice application is made to the Court for leave to amend. Is not that a ground on which the Court will exercise the discretion which it takes under the Act? With the rest of the case I have nothing now to do. I think the plaintiffs are entitled to obtain leave to amend their statement of claim, but within a short limited time, and this application must be at their own expense."

*Terms of order allowing amendment.*—In *Cargill v. Bower*, L. R. 4 Ch. D. 81, which was an application by a defendant for leave to file a separate and amended statement, Malins, V. C., said:—"Upon the question of costs, I think that the defendant should indemnify the plaintiff against any reasonable costs which he has rendered necessary in consequence of not having put forward his full defence at an earlier period; but as to the amount of costs, it has always been the habit of the Court, when it sees that any undue expenses have been caused, to give such directions as it may think fit with regard to costs, although it is true that, as a general rule, the costs are left to the Taxing Master. In this case, I can see no ground whatever for the plaintiff having instructed two Queen's counsel and a junior upon such an application as this: I shall, therefore, direct that the costs of one counsel only shall be allowed, and that may be either a senior or a junior brief, as the plaintiff thinks fit. With regard to the costs of the other defendants who have appeared, I think no objection should have been raised by them to such an application as this; at all events, a consent brief would have been sufficient; I shall, therefore, allow them 40s. only for costs."

When the hearing of an action is adjourned in order to allow parties to be added, the party who applies for the adjournment must pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day, *Lydall v. Martinson*, L. R. 5 Ch. D. 780; see also, *Chesterfield Co. v. Black*, W. N. (1877) 65, and cases collected in *Robinson & Joseph's Digest*.

*Costs occasioned by amendment.*—In *McGillivray v. McConkey*, 6 Pr. R. 58, V.-C. Blake said:—"I think (1) that if a plaintiff amends his bill by striking out portions, and altering it so that the answer put in is rendered useless, as a general rule, the defendant should receive the costs of this portion of his defence rendered useless by the act of the plaintiff; but, (2) if the amendments are not of so wide a scope as this, although so extensive as to contain new charges which may occasion another answer, I think that the plaintiff is not bound to have made such charges in his original bill, and the defendant, if eventually ordered to pay costs, should bear also such additional costs; and (3) when a party is entitled to costs, it is not proper to make the application for them in Chambers. It is proper to make it at the hearing, when the Judge has the whole case before him. In nine cases out of ten he can then better judge of the nature and propriety of the amendments, and in the tenth case he can refer it to the Master to ascertain this, and to act upon his finding on the taxation."

2. *Compulsory amendment of the pleadings of the opposite party—Prolivity.*—In *Davy v. Garrett*, 38 L. T. N. S. p. 81, Baggallay, L. J., said:—"Prolivity of pleading might be of two kinds: first, the prolivity might consist in necessary facts being stated at undue length; and secondly, it might consist in the statement of unnecessary facts. The first kind of prolivity was not so objectionable, as it was not calculated to embarrass the defendant, and it might be remedied by the Court, under O. XIX., r. 2 (Ont. O. XV., r. 2), which empowers the Court to order the costs occasioned by unnecessary prolivity to be borne by the party chargeable with the same. The second kind of prolivity was more serious and might embarrass the defendant by rendering it difficult or impossible for him to know how to deal with the unnecessary facts." And *Thesiger, L. J.*, said:—"Prolivity, standing by itself, when carried to an extreme degree, would be a sufficient ground for striking out the pleading, still more so when it was coupled with statements of evidence, and in the present case the statements of facts were so mixed up with the statements of evidence that it was impossible for the defendants to know what was the case they had to meet. But the statement of claim was embarrassing on another ground. Plaintiff's counsel said, at the bar, 'that they intended to shape their case in a triple alternative form.' Alternative cases should not be mixed up together, but should be classed under separate headings, and alternative claims to refer should be clearly stated, S. C.; L. R. 7 Ch. D. 473."

*Embarrassing.*—In *Heugh v. Chamberlain*, W. N. (1877) 128, the Master of the Rolls is reported to have said that embarrassing meant "bringing forward a

**O. XIII.**  
**R. 1.**

defence which the defendant was not entitled to make use of," but there are many cases in which pleadings have been held to be embarrassing on account only of the difficulty in ascertaining definitely what the pleading really meant. The English reports are full of cases in which applications have been made to strike out pleadings as embarrassing. Under the English practice any allegation in a pleading not denied is taken as admitted. It is, therefore, of the greatest consequence closely to scrutinize the pleading and deny all that is material, and in the case of indefinite statements embarrassment frequently arises. Under the Ontario practice, however, O. XV., r. 24, the silence of a pleading as to any allegation contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation. This was the rule which formerly existed in the Court of Chancery, and in practice in that Court an application to strike out a pleading as embarrassing was unknown. The power given, however, by the present Act, to strike out a pleading upon that ground shews that it may have been thought probable that under the new system embarrassment might take place. Reference may, therefore, if necessary, be made to *Heap v. Marris*, L. R. 2 Q. B. D. 630; *Askew v. North-Eastern Railway Company*, W. N. (1875) 238; *Hope v. Banks*, W. N. (1876) 38; *Golding v. Wharton Rail and River Salt Company*, W. N. (1876) 40; *Cashin v. Cradock*, L. R. 3 Ch. D. 376; *Blake v. The Albion Life Assurance Society*, 35 L. T. N. S. 269; *Berdan v. Greenwood*, L. R. 3 Ex. D. 251; *Phillips v. Phillips*, L. R. 4 Q. B. D. 127; *Heugh v. Chamberlain*, W. N. (1877) 128; *Turquand v. Fearon*, 40 L. T. N. S. 543; *Golding v. The Wharton Salt Works Company*, L. R. 1 Q. B. D. 374; *Williamson v. The London and North-Western Railway Company*, L. R. 12 Ch. D. 787; *Watson v. Rodwell*, L. R. 3 Ch. D. 380; and cases collected in *Robinson & Joseph's Digest*.

*Order for amendment is discretionary and usually not appealable.*—See *Golding v. Wharton Salt Works Co.*, L. R. 1 Q. B. D. 374. But if the Judge of the Court below has acted upon a wrong principle it is otherwise, *Watson v. Rodwell*, L. R. 3 Ch. D. 380; *Davy v. Garrett*, L. R. 7 Ch. D. 473.

*Scandalous.*—Under the former practice in Chancery a motion might be made at any time, before or at the hearing, to have any pleading, petition or affidavit taken off the file for scandal, or to have the scandalous matter expunged, G. O. Chy. No. 70. Deprivation of the costs of the unnecessary matter was the only penalty for impertinence or irrelevancy, G. O. Chy. Nos. 6, 71. It was said at one time that without a special reference the taxing officer would not consider a question off impertinence, but in later years it has been his constant practice to do so without any direction from the Court. Scandal consists in the allegation of anything which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shewn in the cause; to which may be added, that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous, *Daniell*, Ch. Fr. (5 Ed.) 290.

If, however, the allegations are relevant to the issue, it is immaterial how scandalous they may be, *Daniell*, (5 ed.) 290. Matter which may be struck out must therefore be both scandalous and impertinent. If it be merely scandalous it is unobjectionable, and if merely impertinent it will not be struck out but disallowed upon taxation, see O. XV., r. 2 (c, d); see, however, notes *ante* under *Embarrassing*.

As to what is scandalous, see *Christie v. Christie*, L. R. 8 Ch. App. 499; *Joddrell v. Joddrell*, 12 Beav. 216. Nothing is scandalous which is relevant to the merits, *Fenhoullet v. Passavant*, 2 Ves. Sen. 24; *Lord St. John v. Lady St. John*, 11 Ves. 526; *Coffin v. Cooper*, 6 Ves. 514; *Everett v. Prythergh*, 12 Sim. 363. Scandalous affidavit taken off the files, *Goddard v. Parr*, 24 L. J. Ch. 783; scandalous matter expunged, *re Bailey's Settlement*, 3 W. R. 133.

*Who may object to scandalous matter.*—An entire stranger to the suit may move to have scandalous matter expunged, or the Court may itself *ex mero motu* make an order. In *Cracknall v. Janson*, L. R. 11 Ch. D., at p. 13, Fry, J., said:—"I think that when the attention of the Court is drawn to scandalous matter, be it by a party to the action who is not injured, or by the proper motion of the Court, or by a stranger, the arm of the Court is long enough to direct that the person who has defiled its records by scandalous matter shall pay the costs of it."

In *Sadlier v. Smith*, 7 Pr. R. 409, V.-C. Proudfoot held that where the plaintiff's solicitor makes the application the proper course is by motion without the special leave of the Court.

*Against whom the motion may be made.*—The solicitor who filed the documen

containing the scandalous matter may be joined as a respondent to the motion and may be ordered to pay the costs as between solicitor and client, *ex parte* Simpson, 15 Ves. 476. In *Ratray v. George*, 16 Ves. 232, both counsel and agent were held to be liable for costs occasioned by the scandalous matter; and see *Bishop v. Willis*, 5 Beav. 83 (note). A party suing *in forma pauperis* must pay costs for scandalous matter, *Id.* Under certain circumstances a stranger to the suit making an affidavit which contains scandalous matter may be ordered to pay the costs of having it expunged. A clerk of the solicitor filing the affidavit might be so liable, *Sadler v. Smith*, 7 Pr. R. 409.

*Costs of motion.*—The costs of the motion if successful will be as between solicitor and client, *re* *Stewart*, 15 Ves. 478, note; *Morgan & Davey's Costs in Chancery*, 28.

*Onus upon motion.*—Where a paper is, in the opinion of the Court, *prima facie* scandalous on its face, the *onus* rests with the party filing it to shew its relevancy to the question raised by the bill, *Ruttan v. Smith*, 1 Ch. Ch. R. 184.

*Waiver of right to move.*—Filing a replication waives all irregularities in any answer previously filed, but does not waive scandal therein, *Id.*

## 179.

2. The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of 4 weeks from the appearance of the defendant who shall have last appeared.

See Eng. R. Sup. C., O. XXVII., r. 2; O. XXIV., r. 1; O. XXV.; Eng. C. L. P. Act of 1852, s. 222; *Id.*, 1856, s. 96; *Id.*, 1860, s. 36.

One order of course to amend the bill, as the plaintiff may be advised, may be obtained by the plaintiff upon *precipe*, at any time before filing the replication, and within four weeks after the answer, or the last of several answers, has been filed, G. O. Chy. No. 81.

Under the common order to amend, the plaintiff cannot entirely change the nature of the bill, *Smith v. Smith*, Coop. temp. Eldon 141; *McGillivray v. McConkey*, 6 Pr. R. 56; but see *Budding v. Murdoch*, L. R. 1 Ch. D. 42.

If any of the defendants have answered, the name of a plaintiff cannot be struck out under an order of course; a special application for leave to do so must be made, *Fellowes v. Deere*, 3 Beav. 353; *Dunn v. McLean*, 6 Pr. R. 97.

If one of several defendants has answered, the plaintiff cannot have more than one order of course to amend, *Duncombe v. Lewis*, 10 Beav. 273; *Bainbrigg v. Baddeley*, 12 Beav. 152; *Winthrop v. Murray*, 7 Ha. 150; *Kemp v. Jones*, 1 Ch. Ch. R. 374.

Adding a defendant is an amendment within G. O. Chy. No. 81, Attorney-General *v. Nethercoat*, 2 M. & C. 604: amendment by order of course after a special order is irregular, *Edge v. Duke*, 10 Beav. 184.

A motion for an injunction held abandoned by amending the bill pending the motion, *Gouthwaite v. Rippon*, 1 Beav. 54; *Money Penny v. Dering*, 1 W. R. 99; *Macdonell v. Street*, 13 Gr. 168; and see *Westacott v. Cockerline*, 13 Gr. 159.

After an injunction had been obtained by a sole plaintiff, the bill was amended by adding a co-plaintiff:—Held, that the injunction was gone by the amendment, Attorney-General *v. Marsh*, 16 Sim. 572: but such is not necessarily the result, *Dan. Chy. Pr.* 349, 350, 1527: and it is not essential that the order should expressly state that the amendment is without prejudice to the injunction, *Id.* *Davy v. Davy*, 2 Ch. Ch. R. 81, has not, in more recent years, been considered as shewing the true practice. If the bill is amended in some respect which would have affected the right to the injunction when obtained, the injunction is gone; otherwise it is unaffected by the amendment; see *Evans v. Root*, 1 Ch. Ch. R. 357.



**O. XXIII.**  
**2, 2.**

"Without any leave."—Formerly it was necessary to obtain an order to amend even where the amendment was as of right. Under these words the *ex parte* order will be unnecessary. Note the words "if any" in rule 10 of this order.

"The last of several answers," in Chancery G. O. No. 81, means the last of the several answers filed by several defendants, *Dalton v. Hayter*, 7 Beav. 586; *Lester v. Archdale*, 9 Beav. 156, and not the last answer filed at the time of applying for the order, *Arnold v. Arnold*, 9 Beav. 206; *Collett v. Preston*, 3 Mac. & G. 432.

**180.**

3. A defendant who has set up in his defence any set-off or counter-claim, may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then within 28 days from the filing of his defence.

See Eng. R. Sup. C., O. XXVII., r. 3.

"Counter-claim."—See notes to sec. 16, sub-s. 4.

"Time allowed him for pleading to the reply."—The time allowed is four days, O. XX., r. 3.

"Within 28 days."—As to computation of time, see O. LII. Can this right be exercised after the pleadings are closed under O. XXI?

**181.**

4. Where any party has amended his pleadings under either of the last 2 preceding Rules, the opposite party may, within 8 days after the delivery to him of the amended pleading, apply to the Court or a Judge, to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it, subject to such terms as to costs or otherwise as may seem just.

See Eng. R. Sup. C., O. XXVII., r. 4.

"Within 8 days."—As to computation of time, see O. LII.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"To disallow the amendment."—The more sensible course to pursue seems to be that the plaintiff, when filing his bill, comparatively in the dark, should file a general statement of his case, await the answer, and then by amendment supplement the bill with more particular allegations. The order authorizes a full amendment of the bill, as a matter of right, and this is a far better course than for the plaintiff to make all sorts of charges of fraud, etc., in his bill at random, and then by amendment withdraw them all again, after the defendant had been compelled to incur costs in answering them. The intention of the order under which this amendment is made is to enable the plaintiff to bring the whole case before the Court, and to do this it authorizes the most liberal amendment, per *Blake, V. C.*, in *McGillivray v. McConkey*, 6 P. R. 56.

See notes to O. XXIII., r. 1, as to what amendments are proper or should be allowed.

Costs.—In *McGillivray v. McConkey*, 6 P. R. 56, an application was made to strike out some amendments, *Blake, V. C.*, said:—"If such an application as the present were granted it would open the door to applications without end in Chambers for costs of amendment in all cases where the defendant has to answer new matter, or where his answer filed is rendered to a certain extent valueless by the

striking out of portions of the bill. In most cases the costs of the application would far exceed the expense of the new answer required, or of the old answer rendered partially unnecessary. I think, therefore, (1) that if a plaintiff amends his bill by striking out portions and altering it so that the answer put in is rendered useless, as a general rule the defendant should receive the costs of this portion of his defence rendered useless by the act of the plaintiff. But, (2) if the amendments are not of so wide a scope as this, although so extensive as to contain new charges which may occasion another answer, I think that the plaintiff is not bound to have made such charges in his original bill, and the defendant, if eventually ordered to pay costs, should bear also such additional costs; and (3) when a party is entitled to costs it is not proper to make the application for them in Chambers. It is proper to make it at the hearing, when the Judge has the whole case before him. In nine cases out of ten he can then better judge of the nature and propriety of the amendments, and in the tenth case he can refer it to the Master to ascertain this, and to act upon his finding in the taxation."

As to taxing costs of unnecessary amendments, *Burchell v. Giles*, 11 Beav. 34; *Watts v. Manning*, 1 S. & S. 421; *Pledge v. Buss*, Johns, 663; and where important allegations contained in the original bill were struck out by amendment, the plaintiff had to pay the additional costs occasioned, *Strickland v. Strickland* 3 Beav. 242; *Mavor v. Dry*, 2 S. & S. 113; *Mounsey v. Burnham*, 1 Ha. 22. And see *Bower v. Cooper*, 2 Ha. 408, as to the separation of costs of a defence disproved by the evidence.

## 182.

5. Where any party has amended his pleading under Rule 2 or 3 of this Order, the other party may without leave amend his former pleading within 4 days after the delivery of the pleading so amended under such Rule: or he may apply to the Court or a Judge for leave to amend his former pleading within such further time and upon such terms as may seem just.

See Eng. R. Sup. C., O. XXVII., r. 5; O. XXIV., r. 3; G. O. Chy. Nos. 153-155.

"*May*."—It is not obligatory upon the other party to amend his former pleading. If he do not it stands as an answer so far as it is applicable, and the statements introduced by the amendment are not taken as admitted in Ontario, although it would be otherwise in England, O. XV., r. 24.

## 183.

6. Either party may amend his pleading at any time without order on filing the written consent of the opposite party or his solicitor.

In *Powell v. Jewesbury*, L. R. 9 Ch. D. 34, it was held that the rule in Chancery practice that a defendant cannot demur to what he has previously answered is no longer in force; that leave to amend the statement of defence authorized the putting in a demurrer to part of the statement of claim; and that the defendant's pleading was regular.

"*Within 4 days*."—As to computation of time, see O. LII.

"*Court or Judge*."—See notes to O. IV., r. 1 (a).

*Must the consent be verified by affidavit?*—See notes to O. VI., r. 1.

## 184.

7. In all cases not provided for by the preceding Rules numbered from 2 to 6, of this Order, application for leave to



**O. XXIII.  
R. 7.**

amend any pleading may be made by either party to the Court or a Judge in Chambers, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise, as may seem just.

See Eng. R. Sup. C., O. XXVII., r. 6.

"*Judge in Chambers.*"—See notes to O. IV., r. 1 (a).

"*Upon such terms.*"—See notes to O. XXIII., r. 1.

**185.**

8. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within 14 days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such 14 days, as the case may be, become, *ipso facto*, void, unless the time is extended by the Court or a Judge.

See Eng. R. Sup. C., O. XXVII., r. 7.

This is similar to the Chancery order. A plaintiff having obtained an order to amend his bill is to amend within fourteen days from the date of the order; otherwise the order to amend becomes void, and the case as to dismissal stands in the same situation as if the order had not been made, G. O. Chy. No. 83.

This order has been held to apply to amendments effected by special leave, *Oridland v. Lord DeMauley*, 2 D. & Sim. 560; and includes cases where liberty is given to amend upon the allowance of a demurrer, *Bainbrigg v. Baddeley*, 12 Beav. 152; *Armitstead v. Durham*, 11 Beav. 422.

"*Within 14 days.*"—As to computation of time, see O. LII.

"*Unless the time is extended.*"—See O. LII., r. 9.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

**186.**

9. A pleading may be amended by written alterations in the copies filed and served and by additions on paper to be interleaved therewith if necessary; unless the amendments require the insertion of more than 200 words in any one place, or are so numerous or of such a nature that the making them in the copies filed and served would render the same difficult or inconvenient to read; in either of which cases the amendment must be made by delivering a print or fresh copy of the pleading as amended.

See Eng. R. Sup. C., O. XXVII., r. 8.

"*Filed.*"—This word is not in the corresponding English rule, the pleadings there being delivered merely and not usually filed.

"*Delivering,*" in the second to last line, includes filing, O. XV., r. 28.

## 187.

10. Where any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: "Amended day of ."

See Eng. R. Sup. C., O. XXVII, r. 9.

"If any."—Amendments may in some cases be made without any order, see rules 2, 3 & 5 of this Order.

(a) Where a pleading is amended, the amendment shall be written in ink of a different colour from that used in the original pleading.

## 188.

11. Where a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same.

See Eng. R. Sup. C., O. XXVII., r. 10.

Failure to comply with this rule probably incurs the penalty of rule 8.

## ORDER XXIV.

## DEMURRER.

## 189.

1. Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not shew any cause of action or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply or as the case may be, to which effect can be given by the Court as against the party demurring.

See Eng. R. Sup. C., O. XXVIII., r. 1.

This rule is considered in the notes to the next succeeding rule.

## 190.

2. A demurrer shall state specifically whether it is to the whole or to a part, and if to part only, to what part, of the pleading of the opposite party. It shall state some ground

ROSE UNIVERSITY LAW LIBRARY

**O. XXIV.  
R. 2.**

in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form No. 74 in Appendix (D) hereto. If no ground, or only a frivolous ground of demurrer is stated, the Court or a Judge may set aside such demurrer, with costs.

See Eng. R. Sup. C., O. XXVIII., r. 2; R. S. O., c. 50, s. 128.

*"Any party."*—In Chancery only a defendant could demur. If the answer did not confess the material allegations in the bill the plaintiff had to prove them whether traversed or not, and if the answer did confess and did not sufficiently avoid the bill, the plaintiff set down the cause for hearing upon bill and answer. Under the new practice the plaintiff must still prove his case if not admitted (O. XV., r. 24), and if admitted and not sufficiently avoided a motion for judgment (equivalent to a hearing upon bill and answer) may be made under O. XXXVI., r. 8. A plaintiff will have the option, however, of demurring to a statement embodying a confession and avoidance under the rules under consideration.

*"May demur."*—Whenever any ground of defence is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. A demurrer is an allegation of a defendant which, admitting the matters of fact alleged by the bill to be true, shews that as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer; or that for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer, Mitford. Eq. Pl. 128.

The rule that all matters of fact appearing on a bill are admitted for the purposes of a demurrer has been carried so far that the Court has refused to allow the inaccurate statement of a deed in the bill to be corrected by a reference to the deed itself, *Cuddon v. Tite*, 1 Giff. 395; and see *Campbell v. McKay*, 1 M. & C. 603.

The old rule was that ambiguous statements in a bill may, on demurrer, be construed adversely to the pleader, *Vernon v. Vernon*, 2 M. & C. 145. The later rule is laid down in *Grant v. Eddy*, 21 Gr. 568, as follows:—Under the present system of pleading, it is the duty of the Court, on perusing a pleading with a view of ascertaining whether or not it is sufficient on demurrer, to put a fair and reasonable construction on the pleading to ascertain what is reasonably to be inferred from the language used, and if, as a whole, it presents a case entitling the plaintiff to relief, to allow it to stand, and if even there be some statements which, if taken alone, would render the case ambiguous, yet these should be taken in connection with the remainder of the pleading, so as to make, where practicable, a consistent story entitling the party to relief. A pleader, when dealing with facts peculiarly within the knowledge of the opposite party, is not required to be as precise and particular as if the pleading were in respect of matters known to both. Where a bill alleged with sufficient certainty enough to shew, if true, the relation of trustee and *cestui que trust* to exist between the plaintiff and defendant, the Court, although portions of the bill did not come up to the requirement in this respect, overruled a demurrer for want of equity.

Since the Judicature Act, the Court will allow demurrers less frequently than formerly. In one case it was said that the moral deducible from it was that it was now useless to demur. This remark must, however, as pointed out by Messrs. Cunningham & Mattinson (p. 90), be confined to cases in which a demurrer is filed on technical grounds, and not where it raises the whole question to be determined in the action. In order to discourage demurrers where filed not with this view, the Court will allow the plaintiff to amend without costs, *Halliwell v. Counsell*, 38 L. T. N. S. 176.

*Demurrer for multifariousness.*—By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and, in default of appointment, to the use of the trustees during the life of the wife, on trust for her, for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase money was paid to the trustees of the settlement, and a draft conveyance was approved, in the form of an appointment by the husband and

wife to the purchaser, but before the conveyance had been executed the husband suddenly died, having, by a will dated before the contract, devised all his real estate to trustees upon trust for his widow for life, and after her death to sell and divide the proceeds as therein directed. The widow, who was one of the executors, brought an action against the purchaser, the other executors, and the devisees in trust under the husband's will, asking the Court to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase money if the contract should be completed, and whether, if the contract was completed by the trustees of the settlement alone, the purchaser would be entitled to compensation out of the purchase money in respect of the plaintiff's life interest:—Held, that the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for. James, L. J., said:—"Then as to the difficulty suggested, that the defendant Barker will be kept here as a party while questions in which he is not interested are dealt with and disposed of, one of the most beneficial of the rules under the new system is, that it is quite competent for the Court to say, We will have those two questions in which he is interested tried first—the two first questions, which relate entirely to the demurring defendant, viz., as to what are his rights under the contract—and the Court can put those two questions in the course of trial in the first instance, and determine them as between him and the other parties, and he will not be prejudiced in any way by the other matters which have to be disposed of. It seems to me it would be quite right that the Court should determine in the first instance, what are the rights of Mrs. Barker as against the representatives of the testator." At another place, the same learned Judge said:—"One objection is for multifariousness, but that has ceased to be an objection by the express enactment of the Judicature Act, although, of course, it may be stated," *Cox v. Barker*, L. R. 3 Ch. D. 359.

"Any part of a pleading."—A demurrer as to one part, and a defence as to the remainder, are to be combined in one pleading, O. XXIV., r. 4.

Either party may without leave plead and demur to the same pleading by filing an affidavit as required by O. XXIV., r. 5, or upon obtaining an order under O. XXIV., r. 6. A demurrer will not be allowed to one paragraph when, if taken along with another paragraph, it would be a good pleading, *Nathan v. Batchelor*, W. N. (1876) 172; and see *Grant v. Eddy*, 21 Gr. 568, *supra*.

A demurrer to part of a statement of claim cannot be sustained if the matter demurred to supports the plaintiff's right to any relief, *Watson v. Hawkins*, 24 W. R. 884.

If a paragraph in a pleading set up a distinct cause of action, ground of defence, set-off, counter-claim, or reply, the proper course for the party objecting thereto is to demur, and not to apply at Chambers to strike out the paragraph, *Id.*

As to form of partial demurrer and cases, see notes to O. XXIV., r. 4.

*Want of parties.*—When a defendant demurs for want of parties he should shew with sufficient precision the persons who ought to be parties, not necessarily by name but in such a manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties, *Calvert v. Linley*, 21 Gr. 470.

*Demurrer after statement of defence.*—The rule of Chancery practice that a defendant cannot demur to what he has previously answered is no longer in force, *Powell v. Jewsbury*, L. R. 9 Ch. D. 34. Leave to amend a statement of defence authorizes the putting in a demurrer to part of the statement of claim, *Id.*

*Joinder of issue and demurrer.*—A party may, in the same pleading as his demurrer, join issue upon the other paragraphs of the preceding pleading; and then, upon the argument of the demurrer, he will be taken to admit only the facts stated in the paragraphs demurred to, *Watson v. Hawkins*, 24 W. R. 884.

*A specially indorsed writ*, together with a notice in lieu of statement of claim, under O. XVII., r. 2, are equivalent to a statement of claim for all purposes, and a defendant is therefore entitled to demur to them, *Robertson v. Howard*, 26 W. R. 683.

*Statute of Frauds.*—A defence founded on the Statute of Frauds cannot now be raised by demurrer, *Catling v. King*, L. R. 5 Ch. D. 660; see also *Morgan v. Worthington*, 38 L. T. N. S. 443, and O. XV., r. 23.

**O. XXIV.  
R. 2.**

*Statute of Limitations.*—In *Wakeles v. Davis*, 25 W. R. 60, it was held that the Statute of Limitations must, under the new procedure, be pleaded, and cannot be raised by demurrer. In *Dawkins v. Lord Penrhyn*, L. R. 6 Ch. D. 318, however, it was held that inasmuch as the Statute of Limitations does not merely bar the right to recover land but takes away the title to it, the defence may be raised by demurrer, *Catling v. King*, and *Wakelee v. Davis*, above cited, distinguished as being cases in which the Statute took away the remedy but not the right; see also *Noyes v. Crawley*, L. R. 10 Ch. D. 31, where it was held that the Statute of Limitations was a good defence to a claim for partnership accounts, and could be set up on demurrer.

"*It shall state some ground in law.*"—Hitherto at Common Law it has been sufficient in a demurrer to set out some one ground of demurrer. Other grounds might be taken in argument, and if the demurrer was allowed upon any ground the costs followed as a matter of course.

In Chancery all grounds of demurrer intended to be argued were usually stated in the pleading. It was sufficient, however, to state generally that the objection was that no grounds appeared in the bill which would entitle the plaintiff to the relief asked. Other grounds of demurrer might indeed be taken upon the argument—called demurrers *ore tenus*—but if the ground raised by the pleading failed the success of the other grounds did not entitle the defendant to the costs, *Rump v. Greenhill*, 20 Beav. 512; *Henderson v. Cook*, 4 Drew. 306; *Barber v. Barber*, 4 Drew. 666; *Cooper v. Earl Powis*, 3 D. & Sm. 688.

The authorities as to the disposition of the costs in such cases have not been uniform. The present practice in Chancery where a demurrer on record is over-ruled and a demurrer *ore tenus* is allowed, is to over-rule the former with costs and to allow the latter without costs, *Roche v. Jordan*, 20 Gr. 573; *Prince v. Lough*, 24 Gr. 276.

Where a demurrer on two grounds succeeds as to one, and fails as to another, no costs are given on either side, *Benson v. Hadfield*, 5 Beav. 546; *Allan v. Houlden*, 6 Beav. 148; and see *Paine v. Chapman*, 6 Gr. 338; *Glass v. Munsen*, 12 Gr. 77; *Skinner v. Palmer*, 20 Gr. 374.

*Costs when answer filed to demurrable bill.*—Where defendants had set up in their answer several grounds of defence on which much evidence was gone into, and the Court, without going into these defences, dismissed the plaintiff's bill on a ground not argued at the bar, and which might have been taken by demurrer to the bill, it was held (*Esten, V.-C.*, dissentiente) that the defendants were, notwithstanding, upon the authorities entitled to the whole costs of their defence, *Simpson v. Grant*, 5 Gr. 287.

It being contended that the defendants, not having taken the point upon which the cause turned by demurrer, they were not entitled to receive their costs, *Blake, C.*, after reviewing the cases, said:—"They tend to shew that in a plain case, when all the questions can be effectually disposed of upon demurrer, a defendant is bound to adopt that course at the peril of costs. . . . But it is abundantly clear, both upon reason and authority, that there is no such general rule as that contended for."

In a suit by the purchaser for specific performance of a contract for the sale of an estate, the vendor reserving the "necessary land for making a railway," it was held that the reservation was void for uncertainty, and that the contract could not be enforced, and that though the defence was raised by answer and not by demurrer, the bill must be dismissed with costs, *Pearce v. Watts*, L. R. 20 Eq. 492.

In *Bush v. Trowbridge Waterworks Company*, L. R. 10 Ch. App. 459, on appeal from the Master of the Rolls, where the bill was dismissed at the hearing the defendant was not deprived of his costs on the ground that he might have raised the same defence by demurrer. *James, L. J.*, said:—"A great many cases have been referred to where the Court was of opinion that there was some technical objection, or that there was some other point which might have been raised, and ought to have been raised, if the parties had acted reasonably, by way of simple demurrer, which would have rendered the continuance of the suit unnecessary, and which the Court may take into consideration in dealing with the costs of the suit. But the Master of the Rolls did in this case exercise his judicial discretion, and it is not the practice of this Court to interfere with the exercise of a judicial discretion, especially in a case like this, in which it has always been the custom to convert all these matters, which would otherwise come on upon interlocutory motions, as

rapidly as possible, into a stage of final hearing, so as to have the whole thing brought to a conclusion as quickly as possible, and so as to have only one appeal instead of two." O. XXIV. R. 2.

In *Gildersleve v. Cowan*, 23 Gr. 460, it is said that one principle upon which this Court has steadily acted is, that where two courses of proceeding are open, one less expensive than the other, and a party can with equal advantage to himself adopt either, and he takes the more expensive one he does so at the peril of costs. Where, therefore, a woman, after the death of her husband, was joined as a party defendant, in a suit upon a mortgage created by her late husband, in which she had not joined, and instead of demurring put in an answer, the Court, at the hearing, dismissed the bill as against her, without costs. *Spragge, C.*, in referring to the case of *Bush v. The Trowbridge Waterworks Company*, L. R. 10 Ch. App. 459, above cited, and to the language of *James, L. J.*, said:—"It is clear that the language of the Lord Justice does not apply to the very simple case of this defendant, as to whom it was so obviously a mistake to make her a party at all that she ought to have demurred; or, what would have been still better, have intimated to the plaintiffs, through her solicitor, that, not having joined in the mortgage her rights could not be brought in question in the suit." *Saunders v. Stull*, 18 Gr. 590, approved and followed.

In *Sheehan v. Great Eastern Railway Company*, L. R. 16 Ch. D. 59, it was said that objections for want of parties should be made promptly, and may not be postponed till the hearing where no impediment exists to raising the objection at once.

Charges of fraud do not justify answering a demurrable bill; and where the defendant to such a bill answered, and the cause went to a hearing, the bill was dismissed without costs, *Saunders v. Stull*, 18 Gr. 590.

## 191.

3. A demurrer shall be delivered in the same manner and within the same time as any other pleading in the action.

See Eng. R. Sup. C., O. XXVIII., r. 3.

"*Delivered.*"—Delivery includes filing, O. XV., r. 26.

"*Same manner.*"—See O. XV., rr. 7, 8.

"*Same time.*"—See O. XVIII., rr. 1, 2.

A defendant who has obtained an order extending the time to "deliver his defence," may demur within such extended time, *Hodges v. Hodges*, L. R. 2 Ch. D. 112; but see *Boulton v. Cameron*, 2 Ch. Ch. R. 41; *Chamberlain v. McDonald*, 16. 204.

## 192.

4. A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party, he shall combine such demurrer and other pleading.

A defendant put in a statement of defence, not demurring to any part of the statement of claim. The statement of claim was amended, not making a substantially new case. The defendant obtained leave to amend his statement of defence, and put in a statement of defence, and a demurrer to part of the statement of claim. A demurrer "to such part of the amended statement of claim as claims damages alleged to have been sustained by reason of the alleged wrongful acts of the defendant, in opening the accounts therein in that behalf referred to"—Held, good in form, *Powell v. Jewesbury*, L. R. 9 Ch. D. 34.

YORK UNIVERSITY LAW LIBRARY



**O. XXIV.**  
**R. 4.**

A demurrer to part of the prayer of a bill is not, on that account, erroneous in form. Where a bill prays alternative relief, a demurrer to one of the alternatives is not irregular, *Abbott v. The Canada Central Railway Company*, 24 Gr. 579.

In the above case the demurrer was as follows: As to such part of the plaintiff's said bill as prays for a foreclosure or sale of the said railway, and that possession of the said railway may be delivered to the said plaintiff, and that a manager may be appointed to take possession, and run and operate the said railway, we demur thereto for the want of equity, and, without admitting any of the allegations in the said bill contained, we submit that no case is made on the plaintiffs' own shewing, entitling him to any such relief in respect of the said matters, as against us; and we demand the judgment of the Honourable Court whether we shall be compelled to make any further or other answer to the said bill. In his judgment, Proudfoot, V. C., said:—"I think the demurrer is sufficiently specific, and defines very precisely what is objected to. It is to so much of the prayer as seeks a sale or foreclosure, delivery of possession, and the appointment of a manager. I do not know how it could point out more accurately the part of the bill intended to be objected to. No doubt a partial demurrer must define the part of the bill referred to, *Mit. Eq. Pl. 214*; *Barnes v. Taylor*, 4 W. R. 577; and in expressing the parts of the bill demurred to, it will be sufficient to do so by way of exception, as by demurring to all except certain portions *so long as it distinctly appears to what the demurrer is applied*, *Lewis Eq. Draft. 254*; *Hicks v. Raincock*, 1 Cox 40; *Robinson v. Thompson*, 2 V. & B. 118. The rule thus expressed seems to be sufficiently complied with."

### 193.

5. Either party may without leave plead and demur to the same pleading at the same time by filing an affidavit by such party distinctly denying some one or more material statement or statements in such pleading; or stating that the several matters sought to be pleaded by way of confession and avoidance are respectively true in substance and in fact; and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law. The affidavit is to be annexed to and filed with the plea and demurrer, and a copy of the affidavit is to be served with the plea and demurrer.

"*Without leave.*"—At common law leave had to be obtained, see R. S. O., c. 50, s. 118; but in Chancery no leave was necessary. The English rules adhere to the common law practice, Eng. R. Sup. C., O. XXVIII., r. 5.

"*An affidavit.*"—No affidavit was formerly necessary in Chancery; and at law, only when required by the Judge.

"*By such party.*"—Formerly an affidavit by the party's attorney was sufficient, if the Judge required an affidavit to be put in. If an affidavit from the party cannot be obtained application may be made under the next rule.

"*The objections raised.*"—It is not necessary in a demurrer to state all the grounds of demurrer, O. XXIV., r. 2.

"*Plea.*"—The use of this word was probably accidental. A plea is usually termed, under the new practice, a statement of defence.

### 194.

6. If the party demurring desires to be at liberty to plead as well as to demur to the matter demurred to without filing such affidavit, he may, before demurring, apply to the Court

or a Judge for an order giving him leave to so plead and demur, such application being supported by such affidavit as now required in the Superior Courts of Law; and the Court or Judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, and may direct which issue shall be first disposed of; or may make such other order and upon such terms as may be just.

See Eng. R. Sup. C., O. XXVIII., r. 5.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Such affidavit as now required."—R. S. O., c. 50, s. 118, is as follows: Either party may, by leave of the Court or a Judge, plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney, if required by the Court or Judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded, as aforesaid, by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law, and the Court or a Judge may direct which issue shall be first disposed of.

Reg. Gen. of May 21, 1877, 41 U. C. R., 565, is as follows: That leave shall not be given to demur and traverse the same pleading, unless on affidavit distinctly denying some one or more material statement or statements in such, and that unless in exceptional cases, in the discretion of the Court or Judge, affidavits merely as to the belief of the existence of just grounds of traverse shall not be sufficient.

## 195.

7. Where a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party.

(a) If the demurrer shall not be entered and notice thereof given within 10 days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient, for the same purposes, and with the same result as to costs, as if it had been allowed on argument.

See Eng. R. Sup. C., O. XXVIII., r. 6; G. O. Chy., Nos. 121, 146, 418.

"Enter the demurrer for argument."—For form of *præcipe* upon entry for argument, see Forms, No. 86.

"Give notice."—For forms of notice, see Forms, No. 28.

The length of notice heretofore has been in Common Law four days, and in Chancery seven days.

As to cases unprovided for by the new practice, in which the former practice of the Courts varied, see notes to sec. 12.

"Within 10 days."—As to computation of time, see O. LII.

## 196.

O. XXIV.  
R. 8;

8. While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended unless by order of the Court or a Judge; and no such order shall be made except on payment of the costs of the demurrer.

See Eng. R. Sup. C., O. XXVIII., r. 7; Reg.-Gen., T. T. (1856) Nos. 14, 15 (Ont.)

Under the former practice in Chancery the plaintiff might at any time prior to the demurrer being set down for argument, pay to the defendant \$4 for his costs of demurrer and obtain an order to amend his bill, *Daniell, Chy. Pr.* (5th Ed.) 509, 510; *Martin v. Reid*, 6 U. C. L. J. 143. If a demurrer is properly said to be "pending" from the time of its filing this useful practice will no longer be available.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

A plaintiff may amend after demurrer allowed and yet may appeal, *Lidlitter v. Long*, 4 M. & C. 285.

## 197.

9. Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer.

See Eng. R. Sup. C., O. XXVIII., r. 8.

## 198.

10. If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

The Court would not generally give leave to amend after a general demurrer had been allowed, *Nowell v. Andover Rail. Co.* 7 Jur. N.S. 839; but doing so was in the discretion of the Court, *Wellesley v. Wellesley*, 4 M. & C. 558; *Tyler v. Bell*, 1 Keen, 826; *Sibson v. Edgeworth*, 2 D. & Sm. 73; *Osborne v. Jullion*, 3 Drew. 596; *Rawlings v. Lambert*, 1 J. & H. 458; and the later practice in Chancery has been, upon the allowance of the demurrer, as a matter of course to give leave to amend unless it is clear that no amendment can be made which will better the bill. Even though leave to amend be given, a demurrer allowed puts an end to a pending injunction *Schneider v. Lizardi*, 9 Beav. 461; demurrer allowed without prejudice to a new bill, *Oriental Navigation Co. v. Briggs*, 10 W. R. 125.

An order allowing a demurrer with costs, carries with it the costs of a pending motion, *Gladstone v. Ottoman Bank*, 1 N. R. 512.

A motion stood over at the request of the defendant, who then filed a demurrer which was allowed, and the plaintiff ordered to pay to the defendant the costs occasioned by the demurrer and the costs of the suit; the costs incurred on the motion were held to be costs in the cause, *Finden v. Stephens*, 12 Jur. 319; overruling S. C. 11 Jur. 898.

An application to stay proceedings pending an appeal from an order overruling a demurrer is to the discretion of the Court. Where, allowing plaintiff to proceed would so prejudice the defendant as virtually to defeat the appeal, proceedings

will be stayed; but where the defendant fails to shew that he would be prejudiced a stay will be refused. In a case where the stay moved for was refused the Court ordered that any answer put in should be without prejudice to the appeal from the order overruling the demurrer, *McMurray v. The Grand Trunk Railway Company of Canada*, 3 Ch. Ch. R. 125. **O. XXIV. R. 10.**

As to costs, see notes to rule 2 of this order.

### 199.

11. Where a demurrer to any pleading or part of a pleading is allowed in a case not falling within the last preceding Rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

See Eng. R. Sup. C., O. XXVIII., r. 10.

### 200.

12. Where a demurrer is overruled, the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct.

See Eng. R. Sup. C., O. XXVIII., r. 11.

An order overruling a demurrer may be appealed from though the pleading is amended, *Jackson v. North Wales Rail. Co.*, 13 Jur. 70, note; but see *Wellesley v. Wellesley*, 4 M. & C. 554.

### 201.

13. Where a demurrer is overruled, the Court may make such order, and upon such terms as to the Court shall seem right, for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.

See Eng. R. Sup. C., O. XXVIII., r. 12.

In Chancery it is usual, immediately after judgment has been given overruling a demurrer, for counsel to ask for time to answer, a request which is as usually granted unless it is apparent that the whole point in controversy has been raised by the demurrer. The terms imposed are that it should be filed in some reasonably short period, and that the costs of the demurrer should be paid.

In *Bell v. Wilkinson*, W. N. (1878) 3, the Judge on argument of a demurrer overruled it, and refused leave to the defendant to put in a statement of defence. The defendant appealed. The Court held that the practice of the Chancery Division was almost as a matter of course after demurrer to allow the defendant to put in his answer; that under the new system of pleading introduced by the Judicature Acts the practice of the Common Law Division ought, if possible, to be assimilated to the practice of the Chancery Division, and that the defendant ought, therefore, to have leave to put in his statement of defence.

After a demurrer had been overruled the bill was amended and the defendant answered, not taking in his answer the objection which had been raised on the demurrer:—Held, that the defendant might at the hearing take the same objection, *Johnnasson v. Bonhote*, L. R. 2 Ch. D. 298.

**O. XXIV.  
R. 13.**

A demurrer to the statement of claim by the defendant, other than the company, on the ground that the action could only be maintained by the company, was allowed, but the plaintiff obtained leave to amend his writ and statement of claim by adding the company as plaintiffs, the production by him of any authority from the company to sue in their name being held to be unnecessary. As the plaintiff charged fraud against the demurring defendants, the question whether their costs of the demurrer should be paid by him was reserved till the trial of the action, *Duckett v. Gover*, L. R. 6 Ch. D. 82.

An order overruling a demurrer is not an interlocutory order, *Trowell v. Shenton*, L. R. 8 Ch. D. 318.

**202.**

14. A demurrer shall be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 86 in Appendix (E).

See Eng. R. Sup. C., O. XXVIII., r. 13.

**ORDER XXV.**

**DEFAULT OF PLEADING.**

**203.**

**O. XXV.  
R. 1.**

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of such time, apply to the Court or a Judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or Judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other order, on such terms, as to the Court or Judge shall seem just.

See Eng. R. Sup. C., O. XXIX., r. 1.

"*Within the time allowed for that purpose.*"—As to the time within which a statement of claim must be delivered, see O. XVII.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

*Jurisdiction to extend time after dismissal.*—In *Whistler v. Hancock*, L. R. 3 Q. B. D. 83, the defendant obtained leave to appear and defend. On the 15th of December a Master made an order dismissing the action for want of prosecution, unless the statement of claim were delivered within a week. On the 22nd of December the plaintiff took out a summons to set aside the appearance, and this on the 27th of December was dismissed by the Master. The plaintiff gave notice of appeal against the decision of the Master. On the 29th of December the plaintiff delivered a notice in lieu of statement of claim. On the 31st of December the plaintiff took out a summons for further time for delivering statement of claim, and on the 1st of January the Master made an order giving the plaintiff a week's time. This order was set aside on appeal by Fry, J., on the ground that the Master had no jurisdiction to make the order. On appeal Cockburn, C. J., said:—"This is a very plain

case. The defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff took out a summons to set aside the appearance, and if he could have obtained an order to that effect before the week was out he would have been the victor; but before his summons could be heard he fell under the operation of the order dismissing the action, and the action was at an end. It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when, by the operation of the Master's order, it was defunct. For these reasons I think the Master had no jurisdiction, and the order of Fry, J., was right."

This decision was followed in the Exchequer Division in *Wallis v. Hepburn*, L. R. 3 Q. B. D. 84 (note), where the same question arose. An order was made at Chambers on the 8th of November, 1877, to dismiss the action unless a statement of claim were delivered within ten days. The time having expired, on the 20th of November a Master's order was made extending the time for delivering the statement of claim. This order having been affirmed at Chambers by Pollock, B., the defendants appealed. The Court (Cleaesley, B., and Hawkins, J.,) after consulting the Judges of the Queen's Bench Division, held that there was no jurisdiction to make the order of the 20th November, the action being then dead, and that the order must be set aside.

The next case was *King v. Davenport*, L. R. 4 Q. B. D. 402. In that case, an order having been made on the 6th of May dismissing the action for want of prosecution if the statement of claim were not delivered within fourteen days, on the 19th of May the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver statement of claim. The summons was, on the 20th, by the consent of the parties in writing indorsed thereon, enlarged till the 21st, and on the 21st a Master made an order giving seven days more for delivery of statement of claim; Pollock B., having rescinded the order of the Master on the ground that he had no jurisdiction, the action being at an end on the 20th of May:—Held, that the decision of the learned Judge was correct.

In *Burke v. Rooney*, L. R. 4 C. P. D. 226, the cases of *Whistler v. Hancock* and *Wallis v. Hepburn* were distinguished. In that case, on the 25th March, a Master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day; but, on the day following, a summons was taken out "for further time to answer the interrogatories":—Held, that it was still competent to the Court or a Judge to enlarge the time for moving to set aside or vary the order of the 26th of March. Lord Coleridge, C. J., pointed out that in *Whistler v. Hancock* the order dismissing the action had been allowed to stand, being neither complied with or appealed against, and that the application failed because it did not seek to set aside that order.

In *Carter v. Stubbs*, 15 L. J. 135, a Master's order was made on June 17, dismissing the action unless the plaintiff answered certain interrogatories within seven days. The plaintiff swore an affidavit in answer to the interrogatories on the seventh day, but did not file it until the eighth day. On July 2 the plaintiff took out a summons to rescind the order of June 17, and on July 9 a Master made an order rescinding it. On appeal to Hawkins, J., at Chambers, the hearing of the appeal summons was adjourned until July 20. In the meantime the plaintiff took out two further summonses—one to shew cause why the time for appealing from the order of June 17 should not be extended; and the other to shew cause why the same order should not be varied by altering the seven days to fourteen. On July 20, Hawkins, J., made an order in favour of the plaintiff on each of the two summonses. On the Common Pleas Division affirming this order the defendant appealed; but the appeal was dismissed, their Lordships holding that Hawkins, J., had jurisdiction to make the order.

Where an order giving leave to amend has been granted without limiting the time in which the amendments are to be made, such amendments should be made within fourteen days from the date of the granting of the order; where circumstances prevented this being done, and no order dismissing the bill in the alternative of it not being done, was embodied in the order granting the leave to amend, the referee held it to be competent to the Court to grant further time for amending, even on an application made after the fourteen days have expired, if a proper case was made out for it. *McMurray v. Grand Trunk Railway Company*, 3 Ch. Ch. R. 306: and see also *Vernon v. Vernon*, L. R. 6 Ch. app. 833.

YORK UNIVERSITY LAW LIBRARY



**O. XXV.  
R. 1.**

*Abatement.*—Where a plaintiff had made default in delivering his statement of claim, and had since become bankrupt, notice of motion to dismiss for want of prosecution was ordered to be served on the trustees in bankruptcy, although under rules of Court, 1875, O. L., r. 1 (Ont. O. XLIV., r. 1), the action had not become abated by bankruptcy, *Wright v. Swindon, Marlborough and Andover Railway Company*, L. R. 4 Ch. D. 164.

**204.**

2. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

See Eng. R. Sup. C., O. XXIX., r. 2; R. S. O., c. 50, s. 150.

"*Within the time.*"—See O. XVIII., rr. 1, 2; XXIV., 3.

"*Final judgment.*"—For forms, see Forms, Nos. 147, 148. If in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under rule 2 of this Order, and not interlocutory judgment under rule 4, *Dix v. Groom*, L. R. 5 Ex. D. 91.

**205.**

3. Where in any such action as in the last preceding Rule mentioned there are several defendants, if one of them makes default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

See Eng. R. Sup. C., O. XXIX., r. 3.

**206.**

4. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant, and the value of the goods, and the damages, or the damages only, as the case may be, shall be assessed as hitherto. But the Court or a Judge may order that the value and amount of damages, or either of them, shall be ascertained in any other way in which any question arising in an action may be tried.

See Eng. R. Sup. C., O. XXIX., r. 4.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*In any other way.*"—See notes to sec. 47.

For form of judgment, see Forms, No. 152.

207.

5. Where in any such action as in Rule 4 mentioned there are several defendants, if one of them makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a Judge shall otherwise direct.

See Eng. R. Sup. C., O. XXIX., r. 5.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

208.

6. If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 4.

See Eng. R. Sup. C., O. XXIX., r. 6.

209.

7. In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.

See Eng. R. Sup. C., O. XXIX., r. 7.

"Recovery of land."—See notes to O. VI., r. 4.

For form of judgment, see Forms, No. 150.

210.

8. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land, if the defendant makes default as mentioned in Rule 2, or if there be more than one defendant, and some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants, and proceed as mentioned in Rules 4 and 5.

See Eng. R. Sup. C., O. XXIX., r. 8.

"Mesne profits, etc."—See O. IX., r. 2.

## 211.

O. XXV.  
H. 9.

9. In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.

See Eng. R. Sup. C., O. XXIX., r. 10; G. O. Chy. No. 270.

"Motion for judgment."—See O. XXXVI., r. 1.

Where one of several defendants has not appeared, while the others have appeared and delivered defences, the plaintiff may move for judgment as against the defendants who have delivered defences, under rules of Court (1875), Order XL., r. 11 (Ont. Order XXXVI., r. 8), upon admission, and as against the defaulting defendant, under the combined effect of Orders XIII., r. 9 (no Ontario Order corresponding to this), and XXIX., r. 10 (Ontario Order XXV., r. 9); but as against the latter the action must be set down on motion for judgment, and in both cases two clear days' notice of motion must be given, *Parsons v. Harris*, L. R. 6 Ch. D. 694. In giving judgment in above case, Hall, V.-C., said:—"I think that the motion can be made against all the defendants under the combined effect of the orders; but I also think that although a party has neither appeared nor put in a defence, it cannot be said that he ought not to have notice of what is going to be done; accordingly, as there has been an insufficient notice with regard to the defendant who has not appeared, the motion must stand over for a week, and a fresh notice must be filed with the proper officer. I will, therefore, give leave to amend the notice of motion so as to give notice for the next motion day, and as so amended it must be served upon the defaulting defendant by being filed with the proper officer two clear days before next motion day."

In *Gillott v. Ker*, W. N. (1876) 116, an action was brought against the defendants for the payment of a promissory note. A statement of claim had been delivered, but no statement of defence. The plaintiff moved, under Order XL., r. 11 (Ont. O. XXXVI., r. 8), that one of the defendants might be ordered to pay to the plaintiff the amount of the note, and that a receiver might be appointed of his estate. He submitted that the allegations must be taken to be admitted under Order XXIX., r. 10 (Ont. O. XXV., r. 9). The plaintiff had desired to set the case down on motion for judgment, but the Clerk of Records and Writs refused to set it down, of course, unless notice of motion for judgment had been served, and a copy of this notice had been produced to him with an indorsement of the defendant's default in filing a statement of defence. The Master of the Rolls made no order on the first part of the motion. His Lordship considered that, as the defendants had not pleaded, there was no admission within Order XL., r. 11 (Ont. O. XXXVI., r. 8), but ordered the case to be set down on motion for judgment on an affidavit that the defendants had made default in pleading without any notice of motion.

*Pending business.*—Default in answering in a suit pending when the Judicature Act came into force is not "default in delivering a defence" so as to entitle the plaintiff to set down the action on motion for judgment under this rule, *Culley v. Buttifant*, L. R. 1 Ch. D. 84; and see *Provident Permanent Building Society v. Greenhill*, *Id.* 624.

*Service of notice.*—A notice of motion for judgment is a document which may be delivered, in case a defendant does not appear, by filing it with the proper officer, *Dymond v. Croft*, L. R. 3 Ch. D. 512.

## 212.

10. Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants makes such default as aforesaid, the plaintiff may

either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants. O. XXV.  
R. 10.

See Eng. R. Sup. C., O. XXIX., r. 11.

### 213.

11. In any case in which issues arise other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

See Eng. R. Sup. C., O. XXIX., r. 13.

*"Other than between plaintiff and defendant."*—Issues may so arise by a counter-claim filed by a defendant to which a third party is made a defendant, see notes to sec. 16, sub-s. 4.

*"Delivering."*—Delivery includes filing, O. XV., r. 26.

*"Court or a Judge."*—See notes to O. IV., r. 1 (a).

### 214.

12. Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

See Eng. R. Sup. C., O. XXIX., r. 14.

*"Court or a Judge."*—Prior to the Judicature Act a Judge in Chambers had power to set aside a final judgment signed on default of a plea, *Escott v. Escott*, 6 P. R. 10. As to meaning of the words "Court or a Judge" in the present rules, see notes to O. IV., r. 1 (a).

*"May be set aside."*—In *Atwood v. Chichester*, L. R. 3 Q. B. D. 722, Bramwell L. J., said:—"When sitting at Chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think a correct view."

The cases in which applications have been made are too numerous even to be summarized here. They may all be found in Robinson & Joseph's, and Fisher's Digests.

## ORDER XXVI.

## PAYMENT INTO COURT IN SATISFACTION.

## 215.

O. XXVI.  
R. 1.

1. Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

See Eng. R. Sup. C., O. XXX., r. 1; R. S. O., c. 50, ss. 108-110; Reg.-Gen. T. T. 1836. Nos. 11-13, Ont.

"*Debt or damages.*"—The present rule extends the power of payment into Court, see R. S. O., c. 50, s. 108.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*Pay into Court.*"—In *Spurr v. Hall*, L. R. 2 Q. B. D. 615, it was said that the new practice does not permit a defendant in an action for nuisance raising a question of title to plead payment into Court and to deny the plaintiff's right of action in respect of the same part of the statement of claim, and if he so pleads the statement of defence will be amended as embarrassing under Order XXVII., r. 1. (Ont. O. XXXIII., r. 1.) *Quære*, Whether in any kind of action the defendant can in respect of the same portion of the statement of claim pay money into Court, and deny the plaintiff's right to sue?

In *Berdan v. Greenwood*, L. R. 3 Ex. D. 251, however, it was said that, as a general rule, a defendant may by his statement of defence deny the plaintiff's causes of action, and at the same time plead payment into Court, in respect of the whole or any part of them. *Quære*, Whether the general rule above mentioned may under special circumstances include actions brought to try a right of, or in respect of, property which is denied, or to establish character which has been assailed, and actions where the plaintiff's by the statement of defence charged with fraud. *Quære*, whether *Spurr v. Hall*, L. R. 2 Q. B. D. 615 was correctly decided.

In *Hawkesley v. Bradshaw*, L. R. 5 Q. B. D. 302, the defendant in an action for libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of the innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper and also a payment of 40s. into Court:—Held, overruling the judgment of the Queen's Bench Division that the offering of an apology, and payment into Court, and of a justification, could be pleaded together.

Where a plaintiff claims for distinct pieces of work and labour, alleged in separate paragraphs of the statement of claim, a defendant who has paid money into Court generally need not specify in his statement of defence how much is paid in respect of each head of claim, *Paraire v. Loibl*, 49 L. J. N. S. C. L. 481.

See notes to rule 4 of this Order.

## 216.

2. Such sum of money shall be paid as hitherto into the proper bank or to the proper officer, and the proper officer shall give a receipt for the same. If such payment be made

before delivering his defence, the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 21, in Appendix (B) hereto.

O. XXVI.  
R. 2.

See Eng. R. Sup. C., O. XXX., r. 2.

"*Shall be paid as hitherto.*"—In Chancery, if a defendant desired to pay money into Court, which was of rare occurrence and usually only where he held it as trustee for others, he had to obtain an order in Chambers. Upon presentation of this order at the Accountant's office, he obtained a direction to the Bank of Commerce, upon receiving which, the Bank received the money, gave one receipt to the party paying and forwarded a duplicate receipt to the Accountant's office. No commission was payable to any officer of the Court, see G. O. Chy. Nos. 352—354. At Common Law, a plea of payment into Court was well known and of common practice. The procedure was regulated by R. S. O., c. 50, ss. 109, 121.

## 217.

3. Money paid into Court as aforesaid may, unless otherwise ordered by a Judge, be paid out to the plaintiff, or to his solicitor, on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officers of the Court, or one of the officers, whose duty it is to sign or countersign the cheque.

See Eng. R. Sup. C., O. XXX., r. 3; R. S. O., c. 50, s. 109; Reg.-Gen. T. T., 1856, No. 11 (Ont.)

"*A Judge.*"—For meaning of this word, see O. LXI., and notes to O. IV., r. 1 (a).

"*Unless specially required.*"—In Chancery, it has been necessary to verify the signature of the party in all cases where money in which he was interested was being dealt with by his solicitor.

## 218.

4. The plaintiff, if payment into Court is made before delivering a defence, may within 4 days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then, may, before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 22 in Appendix (B) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and in case of non-payment within 48 hours, to sign judgment for his costs so taxed.

See Eng. R. Sup. C., O. XXX., r. 4; R. S. O., c. 50, s. 111.

"*Within 4 days.*"—As to computation of time, see O. LII.

"*Tax his costs.*"—In an action for rent, and for damages for breach of covenant in not building a wall, and also claiming an injunction, the defendant paid money into Court to satisfy the claim for rent, and pleaded performance of the covenant by building the wall after the commencement of the action, and paid into Court £1



**O. XXVI.  
R. 4.**

In respect of the breach before action. The plaintiff took the money out of Court, confessed "the defence" as to the wall, and claimed costs under O. XX., r. 3 (Ont. O. XVI., r. 7):—Held, that he was not entitled to such costs, for the statement did not amount to a "defence" within the meaning of that rule; but that he was entitled to the costs of the action under O. LV., *Callander v. Hawkins*, L. R. 2 C. P. D. 592.

In an action for work, labour and materials the writ claimed a balance of £373. The defendant paid £200 into Court, under the rule, and gave notice in Form 21, Appendix B, that "that sum is enough to satisfy the plaintiff's claim." The plaintiff took it out under rule 3, but did not give the notice under rule 4, or any other notice. The cause was afterwards referred, under the Common Law Procedure Act, to an arbitrator, "the costs of the cause to abide the event." No pleadings were ever delivered on either side. The arbitrator, after hearing the parties, gave his certificate that the £200 paid into Court was enough to satisfy the plaintiff's claim. The Master having taxed the plaintiff's costs against the defendant up to the time of his taking the money out of Court, and having from that point taxed the defendant's costs against the plaintiff:—Held, that as the £200 had been paid in generally, and the event of the reference was that the plaintiff recovered nothing beyond the amount paid into Court, the plaintiff was not entitled to any costs, and the defendant was entitled to the costs of the suit from the commencement, *Langridge v. Campbell*, L. R. 2 Ex. D. 281.

In an action of damages for breach of covenant, the defendant denied the breach, and also paid money into Court, alleging that it was enough to satisfy the claim. The plaintiff replied joining issue, alleging that the money was not enough, and the issues having been referred to an official referee, he reported that the money paid in was enough to satisfy the claim. The costs were held in the discretion of the Court, and that the discretion in such cases ought to be exercised by allowing the plaintiff his costs of the action up to the time of payment into Court, and allowing the defendant his costs of the action after that time, *Buchton v. Higgs*, L. R. 4 Ex. D. 174; but see *Langridge v. Campbell*, L. R. 2 Ex. D. 281.

"*Sign judgment*."—Where the plaintiff's attorney, by mistake, accepted money paid into Court, and signed judgment for costs, the judgment, upon the application of the plaintiff, was set aside upon payment of costs and plaintiff permitted to proceed with his action, *Emery v. Webster*, 9 Ex. 242.

## ORDER XXVII.

### DISCOVERY AND INSPECTION.

#### 219.

**O. XXVII.  
R. 1.**

1. In case of an examination before the trial, or otherwise than at the trial, of an action, if the examining party desires to have such examination taken in shorthand, he shall be entitled to have the examination taken before any examiner residing at the place of examination competent to take the evidence in shorthand, except where the Court or a Judge sees fit to order otherwise.

*Examination at Law.*—By R. S. O., c. 50, s. 156, any party to an action at law, whether plaintiff or defendant, may, at any time after such action is at issue, obtain an order for the oral examination, upon oath, before a Judge or any other person specially named by the Court or a Judge, of any party adverse in point of interest, or in case of a body corporate of any of the officers of such body corporate, touching the matters in question in the action; and any party or officer examined may be further examined on his own behalf or on behalf of the body corporate of which he is an officer, in relation to any matter respecting which he has been examined in

chief; and when one of several plaintiffs has been examined, any other plaintiff or defendant united in interest may be examined in his own behalf or on behalf of those united with him in interest, to the same extent as the party examined. **O. XXVII. R. 1.**

Sub-s. 2. Such explanatory examination shall be proceeded with immediately after the examination in chief, and not at any future period except by leave of the Court or a Judge; and for the purposes of this section, where the officer of a body corporate has been so examined as aforesaid on behalf of such body corporate, such body corporate shall be deemed to be fully represented by such officer.

Sec. 159 dispenses with the necessity of an order in some cases. Depositions are to be taken in the form of a narrative, and when completed are to be read over and signed (sec. 164). Depositions taken in shorthand, however may be taken down by question and answer, and need not be read over or signed, 41 Vic., c. 8, s. 8 (Ont.). Certified copies of the depositions are admissible as evidence, 42 Vic., c. 15, s. 3 (Ont.).

*Examination in Chancery.*—Any party could examine any other party adverse in point of interest without any order (G. O. Chy. No. 138). A plaintiff could be so examined at any time after answer; and a defendant at any time after answer or after the time for answering had expired.

*Examination under above Rule.*—It is presumed that the above rule does not interfere with the provisions of the Statute 41 Vic., c. 8, s. 8, above referred to.

*Time for examination.*—As above shewn, the examination could not be had at law until after issue, whereas it might take place in Chancery after answer or the time for answering has expired. For the rule of decision in cases of conflict, see notes to sec. 12. Perhaps in this case the periods prescribed in rule 4 of this Order for obtaining an order to produce, might be adopted.

*Procedure to obtain examination.*—As the costs of the examination are now provided for (see the following rule), it is presumed that, except in special cases, no order will be obtained. By the Common Law practice, a copy of the appointment had to be served upon the party and upon his attorney. According to the Chancery practice an appointment was first taken, *McMurray v. G. T. R. Co.*, 3 Ch. Ch. R. 130, and afterwards a subpoena. A copy of the appointment was served upon the solicitor and of the subpoena upon the party, *Campbell v. Tucker*, 7 P. R. 135. For the rule of decision in case of conflicting practice, see notes to sec. 12.

*Parties to examination.*—Rule 6 of this Order contains provisions as to parties to examination. R. S. O., c. 50, sec. 156 and G. O. 138, both require that the party to be examined be adverse in interest to the examining party. A defendant whose interest is identical with that of the plaintiff is a party adverse in interest to his co-defendant, and may be examined by his co-defendant, *Moore v. Boyd*, 8 P. R. 413.

One of two defendants in an action of ejectment allowed judgment to go by default:—Held that he was nevertheless liable to be examined under Administration of Justice Act (1873), sec. 24; R. S. O., c. 50, sec. 156. Mr. Dalton said:—"The point fixed by the Legislature after which the order may be obtained is merely a matter of procedure, and is meant to prevent the plaintiff from 'fishing' in order to frame his next pleading. I do not think the Act intends to restrict the plaintiff to the examination of a party who actively defends a suit," *Bacon v. Campbell*, 6 P. R. 275.

The parties in an action for breach of promise not being competent or compellable to give evidence the plaintiff was not allowed the costs of the preliminary examination of the defendant, *Woodman v. Blair*, 8 P. R. 179.

*Kindersley, V.-C.*, in *Wright v. Wilkin*, 6 W. R. 643, decided that a special examiner has full power to regulate the examination in regard to allowing a shorthand writer to be present, or in admitting the public as he pleases. But *Jessel M. R.* in *re Western Canada Oil Lands and Works Company* L. R. 6 Ch. D. 109, a later case, decided that the office of an examiner is not a public Court and if the presence of the public is objected to the examiner has no discretion to admit them. Upon the examination of two defendants before a Master, he, at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to withdraw, but they refused, the Master thereupon declined to proceed with the examination:—Held, on appeal that the Master should have allowed one defendant to be present on behalf of the plaintiff if he was satisfied that this was required for the proper representation of the plaintiff's interests, *Sivewright v. Sivewright*, 8 P. R. 81.

**O. XXVII.  
R. 1.**

A special examiner has power to exclude witnesses from his room during an examination, and he may exercise such power when the witness is a party to the suit, *Sadlier v. Smith*, 14 U. C. L. J. 30. Held also, that a refusal to comply with the ruling of an examiner in not withdrawing when ordered to do so is a contempt of Court, *Ib.*

A party to a suit having received notice of being examined by the opposite party is not entitled to call for the production of papers in the possession of his adversary in order the better to enable him to give his testimony, *Howcutt v. Rees*, 2 Gr. 268.

*Service.*—An order may be granted for the examination of a party under 36 Vic., c. 8, s. 24 (R. S. O., c. 50, s. 156), although such party resides beyond the jurisdiction of the Court, *Morell v. Morrison*, 6 P. R. 210. Since this decision express provision has been made by Stat. 41 Vic., c. 8, s. 9 (R. S. O., c. 50, s. 170 (b)), for the examination of parties residing out of Ontario, and in such cases the Court may order the examination to be taken at such place and in such manner as may seem just and convenient, and service of the order shall be sufficient if made on the attorney or solicitor of the party, in the same manner as other papers in the suit are served on the attorney or solicitor, unless the Court or Judge otherwise order. An order for the preliminary examination of a party residing out of Ontario under this section will not be made *ex parte*, *Dewalt v. Hughitt*, 7 P. R. 323.

By Con. Stat. Can., c. 79, s. 4, it is provided that, "If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting it appears to any Judge of the Court, that it is proper to compel the personal attendance, at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or a Judge, in their or his discretion, may order that a writ called a subpoena *ad testificandum* or a subpoena *duces tecum* shall issue in special form commanding such person to attend as a witness at such trial or *enquête* of witnesses wherever he may be in Canada." The term "witness" in this Act includes parties to the cause as well as witnesses in the ordinary sense of the word. Examination of defendant after answer under G. O. 138 is an examination of witnesses under this Act, *Moffatt v. Prentice*, 6 P. R. 33. It is not *essential* to a person being a witness that his evidence should be receivable in any event. Examinations *de bene esse* are examples to the contrary, *Ib.* 35. An application for an order under this section is properly made to the Referee in Chambers, *Ib.*

*Time for Service.*—By G. O. Chy. No. 267, forty-eight hours' notice of the examination is to be given to the opposite party. But this does not apply to a witness who is entitled to reasonable notice according to circumstances, *re North Wheel Exmouth Mining Co.* 31 Beav. 628. By Com. Law Pro. Act, R. S. O., c. 50, sec. 160, it is provided that the examining party shall cause a copy of the order and appointment (or of the appointment where no order is required) to be served upon the person so to be examined, and upon his attorney, where he has appeared by attorney, at least forty-eight hours before the hour appointed for the examination, and shall pay to the person to be examined the proper charges for conduct money. By rule of Court 135 of Trinity Term 1856, service of all proceedings was to be made before 7 o'clock p.m., except on Saturday, when it was to be made before 3 o'clock p.m. If made after that time, service was to be deemed as made on the following day. Service on a defendant's attorney at his house at 9.30 p.m. on Saturday, of an order and appointment to examine the defendant at 2 o'clock p.m. on the following Tuesday was held to be irregular, the notice not being sufficient. Rule of Court 135 applies to service of orders and appointments to examine, and this service must be treated as made on the following Monday, *Senn v. Hewitt*, 8 P. R. 70.

*Objections to Service.*—The defendant, who resided in Quebec, arrived in Toronto on Saturday, intending to return home on Monday. He was served on the latter day with a subpoena to attend for examination on Thursday, and was paid \$2. Held, that under these circumstances the bill could not be noted *pro confesso* for non-attendance; held also, that it was not necessary for the defendant to move to set aside the subpoena, *Bolkow v. Foster*, 7 P. R. 388.

*Where examination must take place.*—As a rule a suitor has not a right to bring his opponent to Toronto or elsewhere from his residence for the purpose of interlocutory examination, except upon special grounds. Where, therefore, an order had been made by the Judge's Secretary in Chambers for a plaintiff to attend before a special examiner at Toronto, the venue in the case being laid at

Goderich, and the parties residing there, and plaintiff's solicitor residing there **O. XXVII.**  
 also, the solicitor for the examining defendant residing in Toronto, such order was **R. 1.**  
 rescinded upon the plaintiff refunding the conduct money paid him, without costs, the defendant being held to have acted in accordance with what appeared to have been very generally understood in Toronto as to the rights of examining parties. The proper practice in a case where special grounds exist is to make an application on notice in Chambers shewing such special grounds. Spragge, V.-C., said:—"The paramount object is certainly to get at the truth; and where it can be shewn that it cannot be got at, or got at but imperfectly, without a party being brought to Toronto, from whatever cause that may be, other considerations must give way; but it is going too far to leave it to the will of any suitor to bring any other suitor to Toronto merely on the ground that the examiners in Toronto are more competent than those in the country. . . . I am far from laying down a rule that in no case shall a party be summoned to Toronto; I concur in the propriety of this being done in a case that was put, namely, where a party desired to examine two or more defendants living in different counties, and where it was material to him that their examinations should follow one another without intermission. And there may be many other cases. I would leave to the secretary a larger discretion. I only desire not to leave it to the will of a litigant to summon his opponent to such place and at such time as he thinks fit, and to leave it to the discretion of the Court or its judicial officer," *Gallagher v. Gairdner*, 2 Ch. Ch. 480. See also *Kahn v. Redford*, 3 Ch. Ch. R. 55, which is said to be misreported. The application under the circumstances was refused, but it is understood that the fact that a witness or party can be more efficiently examined in Toronto will weigh with the Court or a Judge on a motion to change the place of examination. *Cooper's Digest*, 1873, p. 111. Where the bill was filed in Toronto, the venue laid in Goderich, but the defendant lived in Hamilton, an application to examine the defendant on his answer before the Master at Goderich was set aside with costs, *McDermid v. McDermid*, 2 Ch. Ch. 372.

Where the defendant, who lived in the County of Russell, was served with a subpoena requiring his attendance before the Master at Kingston for examination, and he accepted the conduct money without objection, it was held that he could not be compelled to attend, *Campbell v. Tucker*, 7 P. R. 135.

**Non-attendance.**—By G. O. Chy. 144, it is provided that a person refusing or neglecting to attend at the place appointed for his examination may be punished as for contempt, and the party desiring the examination, in addition to any other remedy to which he may be entitled, may apply to the Court upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances.

By R. S. O., c. 50, sec. 162, any party person refusing or neglecting to attend as above, or refusing to be sworn, or to answer questions properly put to him, shall be deemed guilty of a contempt of Court, and proceedings may be forthwith had against him by attachment, and by 41 Vic., c. 8, s. 9 (R. S. O., c. 50, s. 170 a), a party so acting shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence struck out and to be placed in the same position as if he had not defended.

A motion to commit the defendant, or take the bill *pro confesso* for non-attendance of the defendant for examination, pursuant to special order, was refused where the order had not been previously served, the appointment only being served, the order not even on the solicitor. It is only in cases where the Court finds that the defendant is in contempt that the plaintiff may have his bill taken *pro confesso*, *McAvilla v. McAvilla*, 6 P. R. 311.

Where a party to be examined refuses to produce books, etc., as required by the notice to produce, served with the order to examine under R. S. O., c. 50, s. 161, or refuses or neglects to attend for examination, or refuses to be sworn, or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the Court and not before a Judge in Chambers. *Semble*, that the action could not be dismissed under 41 Vic., c. 8, sec. 9 (R. S. O., c. 50, s. 170 a), for disobedience by the plaintiff of the notice to produce, *Merchants' Bank v. Pierson*, 8 P. R. 123. The Referee in Chancery, however, had power to commit, see *Abell v. Hiltz*, 6 P. R. 122; *Wagner v. Mason*, 6 P. R. 187. Notwithstanding these powers of summary punishment the order which was usually made in Chancery upon the first default was that the defaulting party should attend at his own expense, and submit to be examined. This order might have been obtained *ex parte* if costs were not asked, but if costs were asked then notice had to be given.

Q. XXVII.  
R. 1.

R. S. O., c. 62, s. 18.—As to a party to any civil suit being summoned as a witness by the opposite party, only applies to calling the opposite party as a witness "at the hearing or trial," and therefore non-attendance to be cross-examined on his answer forms no ground for taking the bill *pro confesso*, *Vardon v. Vardon*, 7 P. R. 436.

*Subject matter of examination.*—Examination of parties is a substitute for the former practice of administering interrogatories with the pleadings, and any question, the answer to which would have been proper as an interrogatory is proper upon an examination. Questions which could be put at the trial of an action would be proper. See *Allhusen v. Labouchere*, L. R. 3 Q. B. D. 654, as to questions which are directed merely to the credit of the party.

A married woman cannot be compelled to disclose the nature of her separate estate upon her examination, not as a judgment debtor, but under R. S. O., c. 50, s. 156; *Standard Bank v. McGuaig*, 7 P. R. 356.

The defendant employed the plaintiff as manager of his business, under a written agreement, at a salary and a commission on the gross amount of sales. Disputes having arisen, the defendant summarily dismissed the plaintiff. The plaintiff commenced an action for wrongful dismissal. The defendant, by his defence, alleged specific acts of misconduct against the plaintiff, and also alleged, in general terms, other acts of misconduct justifying the dismissal. The plaintiff exhibited four interrogatories, of which the substance was to ask the defendant to specify the acts of misconduct on which he relied, and a fifth interrogatory asking for the total amount of the gross proceeds of sales during the period for which the plaintiff claimed remuneration. The defendant refused to answer the first four interrogatories on the ground that they related to the case of the defendant, not of the plaintiff, and the fifth interrogatory, on the ground that as the right to an account of commission was disputed, the defendant was not bound to give such an account at that stage of the action:—Held, by Bacon, V. C., and by the Court of Appeal, that the interrogatories must be answered, *Saunders v. Jones*, L. R. 7 Ch. D. 435.

Where the plaintiffs sued as administrators to recover possession of certain hereditaments for breach of a covenant contained in a lease, and the defendant alleged that the intestate verbally consented to the breach of the covenant, it was held that the plaintiffs were entitled to interrogate the defendant as to when the consent was given, and as to the conversation which took place, but that they were not entitled to interrogate him as to the persons in whose presence the verbal consent was given. Cotton, L. J., said: "The plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce. The defendant is not bound to give the names of the witnesses whom he intends to call at the trial," *Eade v. Jacobs*, L. R. 3 Ex. D. 335.

The defendant is entitled to a discovery of what the plaintiff's case is, and of all matters which destroy it, but not of the evidence by which he intends to support it, *Ashley v. Taylor*, 37 L. T. 522; see also *Commissioners, etc., of London v. Glasse*, L. R. 15 Eq. 302.

A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the Court, specify those to which he objects. Questions which go merely to the credit of the witness, and might be put in cross-examination, cannot be put as interrogatories to a party, and are as such irrelevant. Where the answer to an interrogatory might tend to criminate the person interrogated, he may refuse to answer, but the interrogatory is not therefore objectionable, *Allhusen v. Labouchere*, L. R. 3 Q. B. D. 654.

In a proceeding charging that the mother, in concert with the other two defendants, had abducted and kept in concealment the children of the plaintiff, the two defendants refused to answer certain questions put to them respecting the children, on the ground that their answers would tend to render them liable to a criminal prosecution under the Act respecting offences against the person, it was held that, under these circumstances, the defendants were not bound to answer, *Keith v. Lynch*, 19 Gr. 497; and see *Mansfield v. Childerhouse*, L. R. 4 Ch. D. 82; *Eade v. Jacobs*, L. R. 3 Ex. D. 335; *Lyon v. Tweddell*, L. R. 13 Ch. D. 375; *Johns v. James*, L. R. 13 Ch. D. 370.

*Depositions in evidence.*—By R. S. O., c. 50, s. 165, office copies of depositions taken in a cause, as above mentioned, may be given out, and the examinations and depositions certified under the hand of the Judge or other officer taking the same,



or a copy thereof certified under the hand of the clerk in whose office they are kept shall, without proof of signature, be received and read in evidence, saving all past exceptions. **O. XXVII.**

By 42 Vic., c. 15, s. 9, it is further provided that copies of such examinations and depositions, not necessarily office copies certified under the hand of the Judge or other person taking the same, shall, without proof of signature, be received and read in evidence, and by 41 Vic., c. 8, s. 8, it is provided that copies of depositions taken in shorthand, certified by the person taking the same to be correct, shall, for all purposes, have the same effect as the original depositions in ordinary cases. By G. O. Chy., No. 146, where the examining party uses any portion of the examination taken as provided by previous orders, the party against whom it is used may put in the entire evidence so taken. See rule 21 of this Order.

The examination of a defendant after answer, or after the time for answering has expired, is a substitute for the discovery by answer, and a plaintiff can at the hearing read such examination, or parts of it, in the same manner as a defendant's answer or passages from it could be used against him at the hearing. For this purpose it is not necessary to examine the defendant at the examination of witnesses, *Proctor v. Grant*, 9 Gr. 26.

Where a defendant has been cross-examined on his answer he has a right in all future proceedings in the case to make the same use thereof as under the former practice could be made of the answer to the interrogatories in a bill; and where a defendant, after having been so cross-examined, died, and the cause was revived against his real representatives, the defendants were allowed at the hearing to read such cross-examination in answer to the statements of the bill, thus rendering it necessary that such statements should be proved by two witnesses, or if by one witness only, corroborated by attendant circumstances, *Powell v. Lea*, 20 Gr. 621.

On motion for a decree a plaintiff could always read the answer of one defendant against another by giving notice of his intention to do so, and in like manner he could read the examination of one defendant against another. But the plaintiff could read these only by treating them as affidavits filed in the cause, and the defendant against whom they were to be read could file affidavits in answer to them just as he could to any affidavits filed in behalf of the plaintiff. Of course this was before the passing of G. O. Chy. No. 270, which limits the class of cases which may be heard on motion for decree, *Moore v. Boyd*, 8 P. R. 415.

The examination of a defendant whose interest, being identical with that of the plaintiff, is adverse to that of his co-defendant, may be read at the hearing against the plaintiff if the plaintiff's solicitor has been present at the examination, *Id.*

*Re-examination.*—An *ex parte* order will not be granted for the re-examination of a party under sec. 24 of Administration of Justice Act, 1873, and special circumstances must be shewn, *Laird v. Stanley*, 6 P. R. 322.

An order will not be granted except under the most special circumstances, *Thornburn v. Brown*, 8 P. R. 114.

Neither can there be more than one examination of a party under G. O. Chy. No. 138, *Paxton v. Jones*, 6 P. R. 135.

*Examination on affidavit.*—By G. O. Chy. No. 268, any person who has made an affidavit to be used or which shall be used on any proceeding before the Court, shall be bound to attend for the purpose of being cross-examined, on being subpoenaed for that purpose.

In *Paxton v. Jones*, 6 P. R. 135, it was decided that an affidavit on production is not within the provisions of this order, and therefore a party making such an affidavit does not become liable to cross-examination upon it except so far as this can be had by examination for discovery in the cause. This decision was however overruled in *Dobson v. Dobson*, 7 P. R. 256, where it was decided that a defendant can be examined upon his affidavit on production after he has been examined on his answer, but *semble* where such a course is unnecessary and there is no good reason for not waiting for the affidavit on production, the costs of only one examination will be allowed.

In a very recent case upon appeal from the Referee the Chancellor held that an appointment and subpoena might issue for the examination of a surety in an appeal bond upon his affidavit of justification, *Hughes v. Hughes*, 1 Can. L. T. 189. The feeling among Chancery practitioners, however, has remained in favour of the decision in *Paxton v. Jones*, and the question may still arise for determination. The



**O. XXVII.**  
**R. 1.**

present rules leave the matter uncertain. O. XXVII., r. 8, provides that when an officer of a corporation makes an affidavit on production he shall be subject to cross-examination, and O. XXXII., r. 2, provides that any person having made an affidavit *to be used or which shall be used* on any motion, petition, or other proceeding before the Court, shall be bound to attend for cross-examination.

*Corporations.*—Originally it was necessary to make the officer of the corporation, whom it was desired to examine, a party to the bill, and if the corporation was plaintiff it was necessary for the defendant to file a cross-bill making the officer a party. This practice was superseded by G. O. Chy., Nos. 63 and 64, and R. S. O. c. 50, s. 156, which provide that any officer of a corporation may be examined by the opposite party in the same manner as a party may be examined, see *Lindsay Petroleum Co. v. Pardee*, 6 P. R. 140.

The chief engineer of a railway company is an "officer" of the company within R. S. O., c. 50, s. 156, *Oakley v. Toronto, Grey & Bruce Railway Co.*, 6 P. R. 253, but the tie inspector of a railway company is not an "officer" within this section, *Dalziel v. Grand Trunk Railway Co.*, 6 P. R. 307. When the bill alleged that the contract in question was entered into by the agent of the bank on its behalf, an order was made for his examination, *Consolidated Bank v. Neilon*, 7 P. R. 251.

*Party out of jurisdiction.*—An original bill was filed by a foreign republic, and a cross bill was filed by one of the defendants against the republic and one of its officers, made a party for the purpose of discovery:—Held, that the Court would not order proceedings in the original suit to be stayed until the officer of the republic had appeared, *James, L. J.*, said:—"In this Court, with regard to persons in this country, it is open to a plaintiff in a cross suit to select any person he thinks fit for the purpose of discovery, and if that person is subject to the process of the Court, the plaintiff can use the process of the Court for the purpose of extracting from him, the defendant so selected, whatever can be got from him. But if the plaintiff chooses to select somebody whom he cannot get to appear, he does not thereby obtain a right to stop indefinitely the suit of the original plaintiff. He is at liberty to use the process of the Court, and if he can enforce discovery he is at liberty to do so. That is all the Court can do for a plaintiff in such a position, except that the Court can, for the purpose of doing justice, say to the original plaintiff, 'We will stop your proceedings until you have named some proper person to give the discovery which is sought by the defendant from you.' That is the form of the order which was given at Common Law, and it is the form of the order given at this Court, and is the form of the order which is prescribed by the rules under the Judicature Act. I believe there is no authority whatever, either with regard to an English corporation or plaintiff, or a foreign corporation or plaintiff, for staying the proceedings in the suit until a defendant selected by the plaintiff in a cross suit has entered an appearance in the cross suit," *Republic of Costa Rica v. Erlanger*, L. R. 1 Ch. D. 171; see also *Wilson v. Church*, L. R. 9 Ch. D. 552.

**220.**

2. The costs of every examination of parties or of officers of corporations before the trial, or otherwise than at the trial of an action, as authorized by the present practice of the respective Courts whose jurisdiction is vested in the High Court, shall be costs in the cause, but the Court or Judge in adjusting the costs of the action shall at the instance of any party inquire, or cause inquiry to be made, into the propriety of having made such examination; and if it is the opinion of the Court or Judge, or the taxing master, as the case may be, that such examination has been had unreasonably, vexatiously, or at unnecessary length, the costs occasioned by the examination shall be borne in whole or in part by the party in fault. The taxing master may make such inquiry without any direction.

## 221.

3. It shall be lawful for the Court or a Judge at any time **O. XXVII.** during the pendency of any action or proceeding, to order the **R. 3.** production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

See Eng. R. Sup. C., O. XXXI., r. 11; R. S. O., c. 50, ss. 169, 175.

A plaintiff after delivering a statement of claim is not, as a general rule, entitled under this rule to an order for discovery of documents before a statement of defence is delivered, because until that happens, it is impossible to say what the "matter in question in the action" is, *Hancock v. Guerin*, L. R. 4 Ex. D. 3; and see *Cashin v. Cradock*, L. R. 2 Ch. D. 140; *Republic of Costa Rica v. Strousbey*, L. R. 11 Ch. D. 323.

## 222.

4. Any party may, after the close of the pleadings, (or when the application is on behalf of a plaintiff after the time for delivering the defence of any party to the action has expired,) obtain an order of course upon *præcipe*, directing the adverse party within 10 days after the service thereof, to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the action; and to produce and deposit the same with the proper officer for the usual purposes, and such party shall make discovery and produce and deposit the documents accordingly, without further notice.

See Eng. R. Sup. C., O. XXXI., r. 12; R. S. O., c. 50, ss. 169, 170; G. O. Chy. No. 134.

"Any party."—This rule gives greater power as to compelling production than the former practice either at Law or in Chancery gave, for now "any party" may obtain an order directing "any other party" to make discovery, etc. At Common Law, production could only be obtained from or the inspection of documents ordered against the opposite party, see R. S. O., c. 50, ss. 169, 170. In Chancery a defendant was not entitled before decree to call for production by a co-defendant or to inspect documents produced by him, *Attorney-General v. Clapham*, 10 Ha. app. 68; *Wynne v. Humberston*, 5 Jur. N. S. 5; *Bartley v. Bartley*, 16 Jur. 1062; after decree, however, a defendant could compel production from a co-defendant, *Hart v. Montefiore*, 10 W.R. 97. As to power to examine a co-defendant, see notes to Order XXVII., r. 1.

"After the service thereof."—Service may be made upon the solicitor of the party required to produce, O. XXVII., r. 19.

*Production of documents* is a matter of right in the party claiming it; not a matter in the discretion of the Judge, *Anderson v. Bank of British Columbia*, L. R. 2 Ch. D. 644; *Bustros v. White*, L. R. 1 Q. B. D. 423.

*Particular parties—The Crown.*—In a petition of right the Crown is entitled against the suppliant to an order for discovery of documents, *Tomline v. The Queen*, L. R. 4 Ex. D. 252. See R. S. O., c. 50, s. 10.

*Particular parties—Corporations.*—It has heretofore been necessary to apply in Chambers for a special order when production was sought from a corporation,

**O. XXVII.**  
**R. 4.**

*Lindsay Petroleum Co. v. Pardee*, 6 P. R. 140. Perhaps the reason for the practice, however, no longer exists, as rule 7 of this Order may be taken as supplementary. And see as to corporations, *Ranger v. G. W. R. Co.*, 4 D. & J. 74; *Republic of Liberia v. Imperial Bank*, L. R. 16 Eq. 179; *Law v. London Indisputable Policy Co.*, 10 Ha. app. 20; *Attorney-General v. East Dereham Corn Exchange Co.*, 5 W. R. 486; *Attorney-General v. Mercer's Co.*, 9 W. R. 83; *Cook v. Oceanic Steam Co.*, W. N. (1875) 220.

*Particular parties—Lunatics—Married Women.*—When a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend or by some one acquainted with the facts, *Higginson v. Hall*, L. R. 10 Ch. D. 235; but the next friend of a married woman cannot be compelled to make an affidavit, *Brown v. Capron*, 6 P. R. 203.

*An affidavit must be made although no documents.*—The party called upon to produce must make the affidavit, though he insists that he cannot be compelled to produce the documents, *Rumbold v. Forteach*, 3 K. & J. 44; *Lazarus v. Mosely*, 5 Jur. N. S. 1119; *Nicholl v. Jones*, 13 W. R. 451; and see *Manby v. Bewicke*, 8 D. M. & G. 55; *Quinn v. Ratcliffe*, 9 W. R. 65; *Hanslip v. Kitton*, 1 D. J. & S. 440.

*What must be produced.*—Whether a document would be evidence or not for the party claiming inspection, is not a test of the right to it. Everything which will throw light on the case is *prima facie* subject to inspection, *Hutchinson v. Glover*, L. R. 1 Q. B. D. 138.

The Court will not act merely upon an allegation by a party seeking to protect documents from production, that they are not material, if it appear from their nature, or otherwise, that they may afford material assistance to the party seeking production in establishing his case, *Frase v. Home Insurance Co.*, 6 P. R. 45; but see *Bewicke v. Graham*, W. N. (1881) 44, 45. The plaintiff's case, for the purpose of discovery, consists of everything necessary to obtain a decree including what may be required to answer the defence set up, *The Western Canada Oil Co. v. Walker*, 6 P. R. 191. But before decree no discovery will be ordered which appears to be immaterial to the question to be tried at the hearing, *Merchants' Bank v. Tisdale*, 6 P. R. 51. Inspection was ordered of an agreement of compromise relating to the subject matter of the suit between defendant and a third party, *Hutchinson v. Glover*, L. R. 1 Q. B. D. 138.

Where the documents are in a foreign country, the party required to produce must shew not only that it would be difficult to obtain them, but that he has tried and failed, *Mertens v. Haigh*, 11 W. R. 792; if the party is required to produce or obtain information as to documents not in his possession, he is entitled to have the costs of so doing first tendered to him, *Bethell v. Casson*, 12 W. R. 200.

Documents formerly in the possession of the defendant, and filed by him in the Master's office in another suit, were directed to be produced by the defendant upon his being indemnified against the expense of obtaining them out of Court, *Hamelyn v. Whyte*, 6 Pr. R. 143.

In a suit between defendant and a third party, with reference to the same subject matter, had been compromised. The agreement of compromise was ordered to be produced, *Hutchinson v. Glover*, W. N. (1875) 247.

*Privilege—General rule.*—The general rules as to privilege are applicable to the protection of documents from discovery, *Wade v. East India Co.*, 2 Jur. N. S. 407; *Clegg v. Edmonson*, 22 Beav. 125.

*Privilege—It must be claimed.*—Where a party admits documents to be in his possession he is *prima facie* bound to produce them, or assign a sufficient reason why he should not, *Green v. Aimey*, 2 Ch. Ch. R. 138; an affidavit as to documents, by a party who objects to produce them, is insufficient if it merely states "that they are privileged;" it ought to state and verify the facts upon which the objection is grounded, *Gardner v. Irwin*, L. R. 4 Ex. D. 49.

*Privilege—Former action.*—Inspection was refused of correspondence between the plaintiff and a third party in another action, which would have been privileged in that action. The fact that such action had terminated did not deprive the correspondence of its privileged character, *Bullock v. Corry*, L. R. 3 Q. B. D. 356.

*Privilege—Solicitor and client.*—It is not now necessary, as it formerly was, for the purpose of privilege and protection, that the communication should be made either during or relating to an actual, or even to an expected, litigation. It is

sufficient if they pass as professional communications in a professional character, **O. XXVII. B. 4.** per Sir R. T. Kindersley, in *Lawrence v. Campbell*, 28 L. J. Chy. 780; 4 Drew, 490. This language was quoted with approval in *Minet v. Morgan*, L. R. 8 Chy. App. 361. The case of *McDonald v. Putnam*, 11 Gr. 258, which followed the older rule, must now be considered overruled by *Hamelyn v. Whyte*, 6 P. R. 143. The rule applies to communications with a former solicitor, *Marriott v. Anchor Reversionary Co.*, 3 Giff. 304; *Wilson v. Brunskill*, 2 Ch. Ch. R. 147.

Communications with a solicitor out of the jurisdiction, or the solicitor's clerk, or an accountant or skilled person employed by the solicitor, are within the principle, *Lawrence v. Campbell*, 4 Drew. 485; *Steele v. Stewart*, 1 Ph. 471; *Churton v. Frewen*, 2 Dr. & S. 390; *Hooper v. Gumm*, 10 W. R. 644. The privilege does not extend to communications made to the solicitor, but not in his character of solicitor, *Thomas v. Rawlings*, 27 Beav. 140; and see *Hampson v. Hampson*, 26 L. J. Chy. 612. Privilege does not extend to information which the solicitor has derived from collateral sources, not directly from the client, *Marsh v. Keith*, 1 Dr. & S. 342; *Ford v. Tennant*, 32 Beav. 162; *re Land Credit Society*, 15 W. R. 703.

The privilege is that of the client and not of the solicitor. If, therefore, the client does not object to the production the solicitor cannot, *re Cameron's Coalbrook Railway Co.*, 25 Beav. 1.

*Form of affidavit claiming privilege*.—"I object to produce the documents set forth in the second part of the first schedule, on the ground that, being communications between solicitor and client, they are privileged," is sufficient, *Hamelyn v. Whyte*, 6 P. R. 142. So also is the following:—"A correspondence between the plaintiff and his predecessors in title, on the one hand, and his and their respective solicitors, from time to time, on the other," *Minet v. Morgan*, L. R. 8 Ch. App. 361.

*Privilege, Principal and Agent*.—Communications with a professional or even an unprofessional agent in anticipation of the litigation, and with a view to the prosecution of a claim, or a defence against a claim to the matter in dispute, being confidential are privileged, per *Stuart, V.-C.*, in *Ross v. Gibbs*, L. R. 8, Eq. 522. See this rule applied in the case of the report of a medical officer, *Cossey v. L. B. & S. Coast R. Co.*, L. R. 5 C. P. 146; and in the case of opinions of engineers as to the validity of a patent, *Toronto Gravel Road Co.*, *Taylor*, 6 P. R. 227.

Professional opinions given partly for the benefit of the party requiring production are not privileged, *Reynolds v. Godlee*, 4 K. & J. 88; *Talbot v. Marshfield*, 13 W. R. 885; *Wynne v. Humberstone*, 27 Beav. 421.

*Privilege.—Private memoranda written by the opposite party for his pleasure or convenience will not be ordered to be produced*, *Mattoch v. Heath*, W. N. (1875) 201.

*Privilege—Documents relating to party's own case only*.—Documents which have no bearing on the issue to be tried, or which relate exclusively to the defendant's own title, or to the evidence by which his case is to be established, need not be produced, *Daw v. Eley*, 2 H. & M. 725; *Ingilby v. Shafto*, 33 Beav. 31; and see *Turney v. Bayley*, 12 W. R. 633; *Mansel v. Feeny*, 2 J. & H. 323; *De la Rue v. Dickenson*, 3 K. & J. 388; *Gandee v. Stansfield*, 4 D. & J. 1; *Pelle v. Stoddart*, 1 Mac. & G. 192; *Kay v. Hargreaves*, 14 L. T. N. S. 281; *Turner v. Burkenshaw*, 11 W. R. 861.

The party refusing to produce must shew that the documents relate to his title, and do not relate to that of the opposite party, *Clegg v. Edmondson*, 3 Jur. N. S. 299; *Lind v. Isle of Wight Ferry Co.*, 8 W. R. 540; *Bishop of Winchester v. Bowker*, 29 Beav. 479; *Felkin v. Lord Herbert*, 9 W. R. 756; *Bolton v. Corporation of Liverpool*, 1 M. & K. 88; *Jenkyn v. Bushby*, 14 W. R. 531.

A defendant cannot refuse production merely on the ground that if the plaintiff's claim is unfounded he has no interest in the documents, *Gresley v. Mousley*, 2 K. & J. 288; and see *Rumbold v. Forteath*, 3 K. & J. 44; *Ferrier v. Atwood*, 14 W. R. 597; *Bugden v. South*, 26 L. J. Ch. 425; *Bates v. Master of Christ's College*, 26 L. J. Ch. 449; *Quin v. Ratcliff*, 9 W. R. 65; but see *Robson v. Flight*, 33 Beav. 268.

The plaintiff's case, for the purpose of discovery, consists of everything necessary to obtain a decree, including what may be required to answer the defence set up, *The Western of Canada Oil Company v. Walker*, 6 P. R. 191.

In *Bewicke v. Graham*, W. N. (1881) 44, 45, the following words were in the defendant's affidavit on production: "We have in our possession or power

**O. XXVII.**  
**H. 4.**

certain documents, numbered 101 to 110 inclusive, which are tied up in a bundle, marked with the letter A, and initialed by the deponent, Charles Glanville; the said documents relate solely to the case of the said defendants, and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information and belief, contain anything impeaching the case of the said defendants, wherefore we object to produce the same, and say that they are privileged from production." It was contended for the plaintiff that although, according to *Taylor v. Batten*, 4 Q. B. Div. 85, the documents were sufficiently described for identity, and the plaintiff was bound to take the affidavit as true, still the plaintiff had a right to inspect and see if the documents were such as to be privileged, and that what was stated in the affidavit was not sufficient to protect them:—Held, that the description must be taken to be true, and inspection was refused.

*Privilege—Other persons interested in documents.*—Trustees will not be ordered, in the absence of the *cestui que trust*, to produce title deeds unless the trustee sufficiently represents him, *Few v. Guppy*, 13 Beav. 457; *Fraser v. Home Insurance Company*, 6 P. R. 43. A person in business cannot refuse to produce his book account merely because his customers have an interest in them, and might be judged by the state of their account being disclosed, *Brown v. Perkins*, 2 Ha. Ord. v. Fawcett, 19 L. J. Chy. 487; *Telford v. Ruskin*, 1 Dr. & Sm. 148; *Fraser v. Home Insurance Company*, 6 P. R. 45.

A party must produce relevant documents in the possession of his solicitor or agent, and cannot refuse because the solicitor says they are not relevant, *Manby v. Bewicke*, 8 D. M. & G. 476; *McIntosh v. Great Western Railway Company*, 4 D. & Sm. 544; nor can the solicitor refuse because he claims his ordinary lien, *Lockett v. Cary*, 10 Jur. N. S. 144; *Goodchap v. Weaving*, 16 Jur. 586; *Hope v. Liddell*, 7 D. M. & G. 331; *Hercy v. Ferrers*, 4 Beav. 17; *re Cameron's Coalbrook Railway Company*, 25 Beav. 1; but see *re Gregson*, 26 Beav. 87; *North v. Huber*, 29 Beav. 437.

If the documents are the agent's private property they need not be produced, *Colyer v. Colyer*, 9 W. R. 452.

Documents in the possession of a stranger prior to the institution of the suit, cannot be ordered to be produced in his absence, *Burbridge v. Robinson*, 2 Mac. & G. 244.

Where a person not a party to the suit, has a joint interest in the documents, they will be protected, but full information must be given by the affidavit, *Edmonds v. Foley*, 30 Beav. 282; *Bayley v. Cass*, 10 W. R. 370; *Ford v. Dolphin*, 1 Drew. 222; *Lord Eglinton v. Lamb*, 14 W. R. 170; *Penney v. Goode*, 1 Drew. 474; *Reid v. Langlois*, 1 Mac. & G. 627. Even if the Court should hold that there are grounds for not ordering production of the documents, on account of a third person's interest therein, still the party must give all the information in his power as to such documents as he has partial possession of, and make discovery of their contents so far as they are material, with as much particularity as if he was answering interrogatories under the former practice, *Taylor v. Rundell, Cr. & Ph.* 104; *Bovill v. Cowan*, 15 W. R. 608; *Clinch v. Financial Corporation*, 1 L. R. 2 Eq. 271; *Fraser v. Home Ins. Co.* 6 P. R. 45.

A suit was brought by a married woman to which her husband was joined as a defendant. The plaintiff filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matter in question in the suit. The defendant applied to compel further production, viz. of documents which it appeared the defendant, the plaintiff's husband, had in his possession. It was alleged that he held these documents for the benefit of the plaintiff, and that it was intended to use them at the hearing:—Held, (1) that the possession of the husband could not be said to be the possession of the wife; (2) that a *feme covert* plaintiff, whose husband is a defendant, is not bound to procure production of documents by her husband for the benefit of his co-defendants; (3) that the rule respecting the obtaining of discovery from a co-defendant protected the plaintiff's husband from liability to examination by his co-defendant, *Brown v. Capron*, 6 P. R. 203.

The defendant objected to produce certain documents, on the ground that they were in the possession of a third party, to whom the defendants had assigned all their estate for the benefit of their creditors. The assignee had realized the estate, and distributed the proceeds amongst the creditors:—Held, no excuse for non-production, and a better affidavit was ordered, *British America Assurance Co. v. Wilkinson*, 6 P. R. 268.



O. XXVII.

R. 4.

Where a party had in his possession letters written to him by a person not a party to the suit, which were admitted to be material, he was compelled to produce them, though they were marked "private and confidential," and the vendor objected to their production, *Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447; and see *Wiman v. Bradstreet*, 2 Ch. Ch. R. 77; *Penkethman v. White*, 2 W. R. 380; *Lee v. Hammerton*, 12 W. R. 975. In such cases an undertaking must be given not to use the letters for any collateral purpose, *Richardson v. Hastings*, 7 Beav. 354; *Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447; and generally where a party obtains an order for production and inspection of documents he does so upon an implied understanding not to make public any information so obtained, or to communicate such information to persons not parties to the suit, *Williams v. Prince of Wales Assurance Company*, 23 Beav. 338; see *Reynolds v. Godlee*, 4 K. & J. 88; *Enthoven v. Cobb*, 5 D. & Sm. 595; 2 D. M. & G. 632; *Bowen v. Pearson*, 11 W. R. 819.

In an affidavit the reason given for non-production was: "That divers persons not parties to this suit are interested therein respectively, and we have, to the best of our knowledge, information, and belief, particularly set forth, under the said heading, the nature of such interest, and the names and conditions in life of such persons respectively." The report of the case does not disclose the nature of the interest alleged in the other persons. On appeal *James, L. J.*, said:—"The documents are not protected. If documents are in the joint possession of the defendant and a person not before the Court their production will not be ordered, because the Court will not order the defendants to do what they have no power to do; but it is no ground for resisting production that a person not before the Court has an interest in the documents," *Kettlewell v. Barstow*, L. R. 7 Ch. App. 686; see comments upon this case in *Fraser v. Home Insurance Company*, 6 P. R. 45.

*Co-defendants*.—Letters passing between co-defendants are not privileged, *Betts v. Menzies*, 26 L. J. Chy. 528. Under an order to produce, taken out by one defendant, other defendants have no right to compel production or discovery, *Seymour v. Longworth*, 3 Ch. Ch. R. 112. As to obtaining production from co-defendants, see *ante* under "any party."

*Documents tending to incriminate are privileged*, see *Waters v. Earl of Shaftesbury*, 14 W. R. 259; *Howe v. Kernan*, 30 Beav. 547; but it is not the practice to allow either of the Statutes of Elizabeth to be an excuse for resisting discovery, *Bunn v. Bunn*, 12 W. R. 561. Where fraud is charged no privilege can be claimed for documents relating to the alleged fraud, *Feaver v. Williams*, 11 Jur. N. S. 902; *Phillips v. Holmes*, 15 W. R. 578; but see *Charlton v. Coombes*, 4 Giff. 372; *Mornington v. Mornington*, 2 J. & H. 697; and see as to action for penalties, *Society of Apothecaries v. Nottingham*, W. N. (1875) 259.

*Place of production*.—Under an order for production in Chancery the documents are to be deposited in the office of the Clerk of Records and Writs, or of the Deputy-Registrar in the County; but production is allowed at the party's place of business, if he states that the documents are in constant and necessary use in his business, *Grane v. Cooper*, 4 M. & C. 283; and see *Mertens v. Haigh*, *Johns*, 735; but it is not sufficient to shew that the books, etc., are in constant use, without also stating that they cannot be removed without inconvenience, *Hooper v. Gumm*, 2 J. & H. 602; *Hamelyn v. Whyte*, 6 P. R. 143; and production is frequently ordered at the office of the solicitor of the party ordered to produce, see *Groves v. Groves*, 2 W. R. 86; in such case the solicitor may not charge the party inspecting for attendances, *Flockton v. Peake*, 12 W. R. 1023; see also *Macdonell v. McKay*, 2 Ch. Ch. R. 141.

*Privilege—Deeds*.—Defendants before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals:—Held, that the land having been conveyed to the plaintiffs in fee simple, they were *prima facie* entitled to the land down to the centre of the earth, and unless the defendants could shew that they were not so entitled the plaintiffs could not be compelled to produce their title deeds, *Egremont Burial Board v. Egremont Iron Ore Co.*, L. R. 14 Ch. D. 158; and see *Anon.* W. N. (1876) 40.

*Privilege—Mortgagee*.—If a mortgagee denies the title of a mortgagor claiming to redeem, he must produce the mortgage deed, *Patch v. Ward*, L. R. 1 Eq. 436; *Bridgewater v. DeWinton*, 12 W. R. 40; *Jones v. Jones*, *Kay*, app. 6; but not where he submits to be redeemed, *Howard v. Robinson*, 4 Drew. 522; *Weeks v. Stanton*, 13 W. R. 489; see *Freeman v. Butler*, 33 Beav. 289; *Smith v. Barnes*, L. R. 1 Eq. 65; *Bell v. Chamberlain*, 3 Ch. Ch. R. 429.

YORK UNIVERSITY LAW LIBRARY



**O. XXVII.**  
**R. 4.**

*Sealing up portions of productions.*—The party producing may seal up irrelevant parts, *Mansel v. Feeny*, 2 J. & H. 320. *Talbot v. Marshfield*, L. R. 1 Eq. 6; as to where parts of a document for which privilege is claimed are so interspersed with the rest of the document that sealing up would be impossible, see *Churton v. Frewen*, 2 Dr. & S. 390; *Carew v. White*, 5 Beav. 172.

*Who may inspect productions.*—The agent for purposes of inspection ought to be a legal agent, or at least a general agent, and not one appointed for the special purpose, *Draper v. Manchester etc. Rail. Co.*, 3 D. F. & J. 23; the order does not authorize inspection by a non-professional relation of the plaintiff, *Summerfield v. Pritchard*, 17 Beav. 9; *Williams v. Prince of Wales Assurance Co.*, 23 Beav. 338; but on special application, and on a case being made out for it, an accountant may be allowed to inspect, *Bonnardet v. Taylor*, 1 J. & H. 383; but see the *Joint Stock Discount Co.*, 15 W. R. 99; *Swansea Vale Rail. Co. v. Budd*, L. R. 2 Eq. 274; *Lindsay v. Gladstone*, L. R. 9 Eq. 132.

*Fees or charges upon inspection of productions.*—A plaintiff obtaining an order for production may inspect documents which are ordinarily produced on payment of customary fees, without payment of such fees, *Hoare v. Wilson*, L. R. 4, Eq. (1). In case production is allowed at a solicitor's office, the solicitor may not charge the party inspecting for attendance, *Flockton v. Peake*, 12 W. R. 1023; see also *Macdonnell v. McKay*, 2 Ch. Ch. R. 141. When an order is made in an action in the Chancery Division for the production of documents at the office of the producing party's solicitor, that party, if ultimately successful in the action, is not entitled, as between party and party, to his solicitor's costs of the production, nor to his own costs of inspecting the documents of the other party, *Brown v. Sewell*, L. R. 16 Ch. D. 517.

*Copies of productions.*—The party inspecting may make a copy of all documents produced not sealed up, *Coleman v. West Hartlepool Harbour Co.*, 5 L. T. N. S. 266.

*Affidavit.*—An affidavit on production is a substitute for discovery on interrogatories, and a party is entitled to such discovery up to the latest possible date. Where an affidavit had been sworn before the service of an order to produce it was held to be irregular and insufficient and a new and better affidavit ordered to be filed, *Kennedy v. Royal Ins. Co.*, 3 Ch. Ch. 489. For form of affidavit, see Forms, No. 34. For forms of clauses claiming privilege, see *ante*.

**223.**

5. A third party who has been served by a defendant under Order 12, Rule 20, and has entered an appearance, shall, for all purposes of, and incident to the production of documents, and to examination, be as between him and such defendant in the same situation as a defendant, and the defendant serving him shall, for the same purposes, be in the same situation as a plaintiff; the time for taking out an order for production or for examination shall be after the party so served has delivered a reply, or where the application is on behalf of the defendant so serving such third party, the time shall be after the time for delivering the reply has expired.

"Reply."—See O. XX.

**224.**

6. A person for whose immediate benefit a suit is prosecuted or defended is to be regarded as a party for the purpose of examination or production of documents.

Under G. O. Chy. No. 139, a party for whose immediate benefit a suit is brought might have been examined, but an order to produce could not be obtained as against him.

## 225.

7. Where the party required to produce documents is a corporation aggregate, the affidavit shall be made by one of the officers of the corporation. **O. XXVII. R. 7.**

Under the former Chancery practice an order for production as against a corporation had to be obtained in Chambers, because of its special form requiring some officer of the corporation to make the affidavit, *Lindsay Petroleum Co. v. Pardee*, 6 P. R. 140. This rule may be found sufficient to obviate the necessity of a special application as to examination of officers of corporations, see notes to O. XXVII., r. 1.

## 226.

8. The deponent shall be subject to cross-examination, and his affidavit shall have the same effect (as nearly as may be) as the affidavit of a party, unless where the Court or Judge sees reason for holding otherwise.

This rule must refer to the rule immediately preceding and authorises the cross-examination of an officer of a corporation upon an affidavit on production made by him. As to cross-examination of a party upon such an affidavit, see notes to O. XXVII., r. 4.

"Court or Judge."—See notes to O. IV., r. 1 (a).

## 227.

9. Persons who have ceased to be officers of a corporation may be examined in the same manner as existing officers.

This was not so under the former practice.

## 228.

10. The affidavit to be made by a party against whom an order for production has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and said affidavit may be in the Form No. 34 in Appendix (C) hereto, with such variations as circumstances may require.

See Eng. R. Sup. C., O. XXXI., r. 13.

As to form of affidavit, see notes to O. XXVII., r. 4.

## 229.

11. Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, to give notice in writing to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him to take copies thereof; and any party not complying with such notice shall

**O. XXVII.  
R. 11.**

not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

See Eng. R. Sup. C., O. XXXI, r. 14.

For form of notice to produce for inspection, see Forms, No. 23.

For forms of notice of time and place for inspection, see Forms, No. 25.

*"Any party not complying, etc."*—The party receiving the notice cannot shield himself from the inspection by suffering the penalty prescribed in this rule. Under the subsequent rules of this order, if he does not produce, an order may be made for inspection, failure to comply with which will render him liable to attachment: if he be plaintiff to have his action dismissed, and if he be defendant to have his defence struck out. See rr. 13—18.

*"Relates only to his own title"*—*"Other sufficient cause."*—See notes to O. XXVII., r. 4.

**230.**

12. No allowance is to be made for any order for production or any notice or inspection under any of the preceding Rules, unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for taking such order, giving such notice, or making such inspection.

See Eng. R. Sup. C., August, 1875, r. 15.

**231.**

13. Notice to any party to produce any documents referred to in his pleading or affidavits may be in the form No. 23 in Appendix (B) hereto, or to the same effect.

See Eng. R. Sup. C., O. XXXI., r. 15; R. Sup. C., April, 1880, Form B, 10 (a.)

**232.**

14. The party to whom such notice is given shall, within 2 days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 10; or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within 4 days from the receipt of such notice; deliver to the party giving the same a notice stating a time within 3 days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents he objects to produce and on what

ground. Such notice may be in the Form No. 25, in Appendix O. XXVII. (B) hereto, with such variations as circumstances may require. R. 14.

See Eng. R. Sup. C., O. XXXI., r. 16; R. S. O., c. 50, s. 170.

"Within 2 days."—As to computation of time, see O. LII.

### 233.

15. If the party served with notice under Rule 13 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

See Eng. R. Sup. C., O. XXXI., r. 17.

"A Judge."—See notes to O. IV., r. 1 (a).

### 234.

16. Every application for an order for inspection of documents shall be to a Judge. And, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

See Eng. R. Sup. C., O. XXXI., r. 18.

"A Judge."—See notes to O. IV., r. 1 (a).

For forms of order upon the application, see Forms, No. 126.

### 235.

17. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

See Eng. R. Sup. C., O. XXXI., r. 19.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"May order that such issue or question be determined first."—See also O. XXX., r. 2, as to the power of the Court to direct the settlement of a special case to determine some issue of law.

Where the issue raised was whether the defendant had agreed to pay the plaintiff a sixth of his profits, the plaintiff was not entitled to production of the books and

**O. XXVII.**  
**R. 17.**

accounts of the defendant before the hearing, *Turney v. Bayley*, 12 W. R. 633; see *Mansel v. Feeney*, 2 J. & H. 323; *De la Rue v. Dickenson*, 3 K. & J. 388; *Kay v. Hargraves*, 14 L. T. N. S. 281; *Finnegan v. James*, L. R. 19 Eq. 72; *Hoffman v. Postill*, L. R. 4 Ch. App. 673. As to the discretion of the Court in cases where the plaintiff asks for discovery to which he is not entitled if wrong, and which, if he succeeds, will be his as a matter of course, see *Elmer v. Creasy*, L. R. 9 Ch. App. 69; *Lett v. Parry*, 1 H. & M. 517; *Lockett v. Lockett*, L. R. 4 Ch. App. 336; *Saull v. Browne*, L. R. 17 Eq. 402; 9 Ch. App. 364; *Great Western Colliery Company v. Tucker*, L. R. 2 Ch. App. 376; *Thomson v. Dunn*, L. R. 5 Ch. App. 573; *Carver v. Piritto Leite*, L. R. 7 Ch. App. 90.

**236.**

18. If any party fails to comply with any order for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution; and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party who obtained the order for discovery or inspection may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

See Eng. R. Sup. C., O. XXXI., r. 20; G. O. Chy. No. 144.

This rule does not apply to cases in which the names of partners are not disclosed under O. XII., r. 12, *Pike v. Keene*, 24 W. R. 322.

"*Fails to comply*."—The failure may be partial or complete—that is an affidavit may be filed which is insufficient, or no affidavit may at all be filed.

Where the affidavit filed is insufficient, the party requiring production should not move to commit, but should move for an order that the party required to produce do file a further and better affidavit, *Lazarus v. Mosely*, 5 Jur. N. S. 1119; *Rumbold v. Forteath*, 3 K. & J. 44; *Hawford v. Lloyd*, 2 W. R. 537; *Rhodes v. Neild*, 1 Ch. Ch. R. 131. As to what is a sufficient affidavit, see notes to O. XXVII., r. 4.

"*Attachment*."—See O. XL.

"*Be liable*."—The Court has a discretion and will exercise it, *Hartley v. Owen*, W. N. (1876), 193; *Anon.*, W. N. (1875) 204. See the subject discussed in *The Republic of Liberia v. Roye*, L. R. 9 Ch. App. 569; and in appeal in the House of Lords, S. C. L. R. 1 App. Ca. 134.

In an appeal from a decision of one of the Masters refusing to dismiss an action for want of prosecution, an order for discovery had been made on the 2nd of November, directing the plaintiff to file his affidavit in four days; subsequently two days more were given him, but he failed to comply with the order. The present summons was then taken out. On the other side it was said that they were now ready to comply with the order. Lush, J., said: "I have not yet granted an application of this kind; nor shall I do so when the parties really intend to answer, this is a highly penal provision, and only to be exercised in the last resort. With regard to the costs of this summons, I should have been inclined to make them the defendants in any event; but as the Master has decided that they should be costs in the cause, and it is the principle of the Act that costs should not be the subject of an appeal; I shall make no order," *Anon.*, W. N. (1875) 202.

"*Court or Judge*."—See notes to O. IV., r. 1 (a).

**237.**

19. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to

found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may shew in answer to the application that he has had no notice or knowledge of the order. **O. XXVII. R. 19.**

See Eng. R. Sup. C., O. XXXI., r. 21.

In Chancery an order to produce did not require personal service. If the person required to obey the same has a solicitor, it is to be sufficient to serve the same upon the solicitor, G. O. Chy. No. 136.

### 238.

20. A solicitor upon whom an order against any party for discovery or inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to an attachment.

See Eng. R. Sup. C., O. XXXI., r. 22; G. O. Chy., No. 136.

### 239.

21. Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite parties; provided always, that in such case the Judge may look at the whole of the examination, and if he shall be of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

See Eng. R. Sup. C., O. XXXI., r. 23; G. O. Chy., No. 146.

The examination of a defendant is a substitute for the discovery by answer; his examination may be read at the hearing, and it is not necessary to call him as a witness *Proctor v. Grant*, 9 Gr. 31; and the examination of a plaintiff by a defendant would be equally admissible, *ib.*; and see *Powell v. Lea*, 20 Gr. 621. Where a defendant has been examined on his answer, the answer and examination may be read in connection, and used as an affidavit in support of a motion for decree, *Mather v. Short*, 14 Gr. 254.

## ORDER XXVIII.

### ADMISSIONS.

### 240.

1. Each party is to admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice, by his own statement or otherwise, that he admits for the purposes of the action **O. XXVIII. R. 1.**

YORK UNIVERSITY LAW LIBRARY



**O. XXVIII.** the truth of the case generally, or of any part of the case, stated  
**R. 1.** or referred to in the statement of claim or defence of the opposite or any other party.

See Eng. R. Sup. C., O. XXXII., r. 1; G. O. Chy. No. 124.

O. XVIII., r. 4, provides that where the Court or a Judge shall be of opinion that any allegations of fact denied or not admitted by either, or any party ought to have been admitted, the Court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

By G. O. Chy. No. 150, a plaintiff was required to make admissions in his replication.

In *Kennedy v. Lawlor*, 14 Gr. 224, it was said, that where pleadings are filed, they should be in language and statement as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. Where pleadings are filed containing useless or improper statements, or admissions so restricted as to render proof necessary, the costs of such pleading will not be allowed to the party filing it; but on the contrary he will be ordered to pay the costs occasioned thereby.

After a decree to take the accounts of a partnership, the Chief Clerk directed that two accountants, one of whom was employed by the plaintiff and the other by the defendant, in investigating the accounts for the purposes of the suit, should report on the accounts, shewing what items were undisputed and what were disputed, and verify their report by affidavit. The accountants verified an account shewing £541 due from the defendant to the plaintiff on the undisputed items, and verified also an account of disputed items. These were items of charge against the defendant, so that, however they were decided upon, the £541 would not be reduced:—Held, that the £541 ought to be ordered into Court; for that, although no certificate had been made, the fact that £541 at least was due from the defendant was ascertained with sufficient certainty to entitle the plaintiff to have it ordered into Court; held also, that under the circumstances of the present case, the defendant must be taken to have admitted by his agent that at least £541 would be found due from him. The principles on which the Court acts in ordering payment into Court after a decree for an account considered, *London Syndicate Co. v. Lord*, L. R. 8 Ch. D. 84.

## 241.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

See Eng. R. Sup. C., O. XXXII., r. 2; R. S. O., c. 50, s. 171.

This is almost a copy of Chancery Con. Gen. Ord. 156, and of Com. Law Pro. Act, R. S. O., c. 50, s. 171.

The section of the Com. Law Pro. Act has been held to apply to all documents the party intends to adduce in evidence, and is not confined to such only as are in his custody or control, *Rutter v. Chapman*, 8 M. & W. 388; *Conger v. McKechnie*, 1 Cham. R. 220; including foreign judgments, *Smith v. Bird*, 3 Dowl. P. C. 641; and documents the validity of which is directly in issue, *Spencer v. Barough*, 9 M. & W. 425.

Among the "just exceptions" are, the admissibility of the document as evidence, *Phillips v. Harris*, Car. & M. 492; and its legal effect, *Hills v. The London Gas Light Co.*, 1 F. & F. 346. An admission so far recognizes the general character and accuracy of the document that no objection can afterwards be made to its reception on the ground of interlineation, *Freeman v. Steggall*, 14 U. C. Q. B. 202; and see *Doed. Wright v. Smith*, 8 A. & E. 255. The admission of a copy does not entitle the plaintiff to put in the copy without first accounting for the original, *Sharpe v. Lamb*, 11 A. & E. 805; and see *Goldie v. Shuttleworth*, 1 Camp. 70; nor does it obviate the necessity of producing the document admitted at the trial, *Vane v. Whittington*, 2 Dowl. N. S. 757; *Lesslie v. Leaby*, 5 Q. B. O. S. 482. The admission when made is conclusive, *Langley v. Earl of Oxford*, 1 M. & W. 508; and when made for one trial continues to be so for any future trial, *Elton v. Larkins*, 5 C. & P. 385; *Barracough v. Greenhough*, L. R. 2 Q. B. 612; *Wilson v. Baird*, 19 U. C. C. P. 98.

A party called on to admit must have a reasonable time allowed him, *Tynn v. Bellingsley*, 3 Dowl. P. C. 810; *Cary v. Cumberland*, 1 Pr. R. 140.

"Cost of proving any document shall be paid, etc."—But this does not apply if the witness who is called to prove the document give evidence on any other fact than the genuineness of the document, *Stracey v. Blake*, 7 C. & P. 404.

The party refusing must pay the costs though the verdict be set aside, and though before the second trial the admission be made, *Lewis v. Howell*, 6 A. & E. 769. The party giving the notice is entitled to the costs only if the document be proved, *Doed. Peters v. Peters*, 1 C. & K. 279; *Day v. Vinson*, 9 L. T. N. S. 723.

*Order for payment into Court.*—In an administration action notice of motion was served upon a defendant, an executor, for payment into Court of money, part of the testator's estate, which it was shewn by affidavit that he had received. The defendant did not appear on the motion:—Held, that the defendant not having disputed the affidavit there was a sufficient admission that the money was in his hands and that he must be ordered to pay it into Court, *Freeman v. Cox*, L. R. 8 Ch. D. 148. *Jessel, M. R.*, said: "The question is whether there is a sufficient admission on the part of the defendant. In *Boschetti v. Power*, 8 Beav. 98, Lord Langdale observed, 'The Court cannot, on motion, order money to be paid or stock transferred into Court, unless it has a distinct admission of the defendant that the money is in his hands, or that the stock is in his name.' The new Orders have no reference to such a case. I will, therefore, make a precedent. It seems to me that the principle on which the Court has ordered payment of money into Court has been that the defendant must admit that the money is in his hands for the purpose of the application."

## 242.

3. A notice to admit documents may be in the Form No. 26, in Appendix (B) hereto.

See Eng. R. Sup. C., O. XXXII., r. 3.

## 243.

4. The production of any written admissions purporting to be admissions in the action, and to be made in pursuance of any notice to admit documents or otherwise, and to be signed by the solicitor of the party by whom, or on whose behalf, they purport to be made, shall be sufficient *prima facie* evidence of such admissions.

See Eng. R. Sup. C., O. XXXII., r. 4; G. O. Chy. No. 48; Reg.-Gen. T. T. 1856, No. 159, Ont.

The English practice requires an affidavit of the solicitor or his clerk verifying the signature to the admissions.

## ORDER XXIX.

## INQUIRIES AND ACCOUNTS.

## 244.

## O. XXIX.

## R. 1.

1. The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

See Eng. R. Sup. C., O. XXX.; R. S. O., c. 50, ss. 189, 197.

Under O. XI., where a writ has been indorsed for an account, as, for instance, in case of a partnership, or executorship or ordinary trust account, an order may be made, either in default of appearance or after appearance, for the account with all usual directions.

For form of order, see Forms, No. 132.

In a suit to take the accounts of a partnership the defendants by their answer, filed before the Judicature Act came in force, admitted the partnership, that they had not accounted, but the plaintiff had not accounted, and that moneys were due from him to them, plaintiff joined issue and moved under the new practice before the hearing under O. XXXVI., r. 8, upon affidavit of service that the accounts of the partnership might be taken :—Held, that he was entitled to the order under this order or under O. XXXVI., r. 8, and an order was made accordingly, *Turquand v. Wilson*, L. R. 1 Ch. D. 85.

As to an order for accounts on a writ indorsed for that purpose, see O. XI.

*Quere.*—Whether, under an order for the ordinary accounts and inquiries relating to partnership dealings and transactions, the question of the fraudulent withdrawal of moneys by one partner and of a claim for interest thereon, might not have been raised, *Barber v. Mackrell*, L. R. 12 Ch. D. 534. But see as to the very extensive powers given to the Masters in taking accounts, G. O. Chy. No. 220.

## 245.

2. Where a reference is made to any official or other referee under the Act, the referee shall have all the powers as to certifying and amending of a Judge of the High Court of Justice, and shall make his report of and concerning the matters ordered to be tried pursuant to the statute ;

(a) The referee may, if he think fit, examine the parties to the action, and their respective witnesses, upon oath or affirmation, and the parties shall produce before the referee all books, deeds, papers and writings in their or either of their custody or power relating to the matters ordered to be tried ;

(b) Neither the plaintiff nor the defendant shall bring or prosecute any action against the referee, or against each other, of or concerning the matters ordered to be tried, and if either

party by affected delay or otherwise wilfully prevent the referee from making his report, he or they shall pay such costs to the other as the High Court, or any Judge thereof, may think reasonable and just; O. XXXI.  
R. 2.

(c) In the event of the referee declining to act, or dying before he has made his report, the parties may, or if they cannot agree, one of the Judges of the High Court may, upon application by either party, appoint a new referee.

See Eng. R. Sup. C. (April, 1880), Form H, 31 & 32.

As to references, see secs. 47-50 and notes.

"*Shall produce.*"—The Judge who directed the reference may make an order for production before the referee, in *re Leigh, Rowcliffe v. Leigh*, L. R. 4 Ch. D. 661.

*Quere.*—Whether such an order can be made by the referee, *Id.*

As to proceedings before referees and their powers, see O. XXXI., rr. 23-28.

## 246.

3. Where a reference is made by order to the award of an arbitrator, the arbitrator shall have all the powers as to certifying and amending of a Judge of the High Court of Justice; and shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award) on or before the time mentioned in the order, or on or before such further day as the arbitrator may from time to time appoint and signify in writing signed by him and indorsed on the order;

(a) The arbitrator may (if he think fit) examine the said parties to the action, and their respective witnesses, upon oath or a affirmation; and the parties shall produce before the arbitrator all books, deeds, papers and writings in their or either of their custody or power relating to the matters in difference;

(b) Neither the plaintiff nor the defendant shall bring or prosecute any action against the arbitrator or one another of or concerning the matters referred; and if either party by affected delay or otherwise wilfully prevent the arbitrator from making an award, he or they shall pay such costs to the other as the arbitrator may think reasonable and just;

(c) In the event of either of the parties disputing the validity of the award, or moving to set it aside, the Court or Judge

YORK UNIVERSITY LAW LIBRARY

**C. XXIX.  
R. 3.**

shall have power to remit the matters referred or any or either of them to the reconsideration of the arbitrator ;

(d) In the event of the arbitrator declining to act or dying before he has made his award, the parties may, or if they cannot agree, one of the Judges of the High Court may, on application by either side, appoint a new arbitrator ;

(e) Unless restrained by any order of the High Court of Justice, or of any Judge thereof, the party or parties in whose favour the award shall be made shall be at liberty after the expiration of 14 days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under the order, and under the award, together with the costs of the judgment.

See Eng. R. Sup. C., April, 1880, Form H. 22.

"*Reference.*"—The old law and practice, with reference to arbitration, are not abolished by the Judicature Act, and consequently when a cause is referred to an arbitrator for decision, according to the old practice, the arbitrator cannot be called on to report to the Court with regard to the matter referred to him, but his decision is final, *Cruikshank v. The Floating Swimming Baths Company*, L. R. 1 C. P. D. 260.

For Statute as to compulsory and voluntary references to arbitration, see R. S. O., c. 50, ss. 189-227.

For order of reference, see Forms, No. 127.

For form of judgment after reference, see Forms, No. 158.

"*After the expiration of 14 days.*"—As to computation of time, see O. LII.

## 247.

4. An order under either of the preceding rules shall be read as if it contained the provisions set forth in the said rule, and shall not set forth the said provisions, but may contain any variation therefrom, and any other directions which the Court or Judge shall see fit to make.

## ORDER XXX.

### QUESTIONS OF LAW.

## 248.

**C. XXX.  
R. 1.**

1. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court ;

See Eng. R. Sup. C., O. XXXIV., r. 1; see Common Law Procedure Act, R. O. XXX. S. O., c. 50, s. 181; and R. S. O., c. 40, s. 85. R. 1.

For the purpose of special cases persons may represent classes, see O. XII., rr. 7, 9, 13; *Bayley v. Miles*, 21 L. T. N. S. 784; *Bardwell v. Sheffield Waterworks Company*, L. R. 14 Eq. 517; *re Brown*, 29 Beav. 401; *Swallow v. Binns*, 9 Ha. app. 47. Where the special case seeks to have the construction of a trust deed determined the trustees ought to be parties, *Vorley v. Richardson*, 8 D. M. & G. 126, overruling *Darby v. Darby*, 18 Beav. 412.

A special case may be amended, *Thistlethwaite v. Garnier*, 5 D. & Sm. 73; after it has been set down for hearing, *Domville v. Lamb*, 9 Ha. app. 55; and even at the hearing, *Bell v. Cade*, 2 J. & H. 122; and on abatement it may be revived, *Wilson v. Whateley*, 1 J. & H. 331; *Ainsworth v. Alman*, 14 Beav. 597. Generally the Court will only give its opinion on questions of construction, and not bind the rights of parties, *Bailey v. Collett*, 23 L. J. Ch. 230.

As to what the Court will or will not decide on a special case, see *Schroder v. Schroder*, Kay, 578; *Evans v. Saunders*, 1 Drew. 415, 654; *Day v. Day*, 15 Jur. 1013; *Leslie v. Thompson*, 9 Ha. 268; *Wilson v. Bennett*, 20 L. J. Ch. 279; *Edwards v. Milbank*, 4 Drew. 606; *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613.

As to the statements of facts, see *Bulkeley v. Hope*, 8 D. M. & G. 36; *Domville v. Lamb*, 9 Ha. app. 55; *Lane v. Debenham*, 17 Jur. 1005.

(a) The parties to a special case may, if they think fit, enter into an agreement in writing, that on the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by the special case, a sum of money, fixed by the parties, or to be ascertained by the Court or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, either with or without costs of the action; and the judgment of the Court may be entered for the sum so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal;

See Eng. R. Sup. C., April 1880, r. 9; R. S. O., c. 50, s. 182.

(b) Every special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby;

See Eng. R. Sup. C., O. XXXIV., r. 1.

(c) Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

See Eng. R. Sup. C., O. XXXIV., r. 1; R. S. O., c. 50, ss. 181-185.

YORK UNIVERSITY LAW LIBRARY



## 249.

O. XXX.  
R. 2.

2. If it appears to the Court or a Judge, either from the statement of claim or defence or reply, or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised either by special case or in such other manner as the Court or Judge may deem expedient; and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

See Eng. R. Sup. C., O. XXXIV., r. 2.

A judge has power, after writ and before statement of claim, to order a point of law to be decided before the issue of fact is tried, *The Metropolitan Board of Works v. The New River Co.*, L. R. 1 Q. B. D. 727; 2 Q. B. D. 67. The Court of Appeal will not interfere with the discretion of the Court below, except in an extreme case, *Ibid.* That under this rule the Court may, in an action involving questions both of law and of fact, direct the question of law to be raised for its opinion before trying the question of fact, has reference only to a case where the action has not yet come on for trial, but by analogy to that rule, the Court will at the trial of an action involving questions both of law and fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact, *Pooley v. Driver*, L. R. 5 Ch. D. 460.

Questions of law will not be tried speculatively; they must be necessary for the decision of the action, *Republic of Bolivia v. National Bolivian Navigation Co.*, 24 W. R. 361.

"Court or Judge."—See notes to O. IV., r. 1 (a).

## 250.

3. Every special case shall be signed by the several parties or their solicitors, and shall be filed by the plaintiff. Copies for the use of the Judges shall be delivered by the plaintiff.

See Eng. R. Sup. C., O. XXXIV., r. 3.

## 251.

4. No special case in an action to which a married woman, infant, or person of unsound mind is a party shall be set down for argument without leave of the Court or a Judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant, or person of unsound mind, are true.

See Eng. R. Sup. C., O. XXXIV., r. 4.

For the practice where a woman, who is a party, marries after the case is set down, see *Johnson v. Brown*, L. R. 8 Eq. 584; *Atty v. Etough*, L. R. 13 Eq. 462. Where an infant interested in the case was born after the setting down, a decree

was made, prefaced by an order to amend and set down against the infant, Barnaby **O. XXX.**  
v. Tassell, L. R. 11 Eq. 363; and see *Savage v. Snell*, L. R. 11 Eq. 264. **R. 4.**

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*Sufficient evidence.*"—The statement of counsel was received as sufficient evidence, *Ebres v. Ebres*, 20 W. R. 480.

**252.**

5. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 87 in Appendix (E) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument.

See Eng. R. Sup. C., O. XXXIV., r. 5.

**253.**

6. This Order shall apply to every special case stated in an action or in any proceeding incidental to an action; whether under the said or any other Act.

See Eng. R. Sup. C., April, 1880, r. 10.

**ORDER XXXI.**

**TRIAL.**

**254.**

1. There shall be no local venue for the trial of any action **O. XXXI.**  
except an action of ejectment, but the plaintiff shall in his **R. 1.**  
statement of claim name the county town in which he proposes  
that the action should be tried, and the action shall, unless a  
Judge otherwise orders, be tried in the place so named. Any  
order of a Judge, as to such place of trial, may be discharged  
or varied by a Divisional Court of the High Court.

See Eng. R. Sup. C., O. XXXVI., r. 1.

In Chancery the bill of complaint had to contain among other things the name of the place at which witnesses are intended to be examined, see Chancery Con. Gen. Ord. 74. At Common Law the name of the County shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading: Provided that in cases in which local description is now required, such local description shall be given, Rules of Pleading, Trin. Term, 1856, No. 4.

The effect of this rule seems to be to abolish all distinction between transitory and local actions, saving only in cases of ejectment.

## 255.

O. XXXI.  
R. 2.

2. After the close of the pleadings either party may give notice of trial for the next sitting of the Court which shall be not less than 10 days thereafter for the place so named or ordered; or if the plaintiff does not give such notice of trial, and if the pleadings were closed 6 weeks before the commencement of such sitting, the defendant, instead of giving notice of trial, may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.

See Eng. R. Sup. C. (June, 1876), r. 13; Eng. R. Sup. C., O. XXXVI., r. 4; G. O. Chy. Nos. 161, 273.

A defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee and served on him. The trustee did not enter an appearance. Notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial:—Held, that what had been done was a sufficient notice of trial, *Chorlton v. Dickie*, L. R. 13 Ch. D. 160.

Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action against him for want of prosecution. A defendant's proper course under such circumstances is to write to plaintiff's solicitor and inquire how the case stands as to the other defendants, *Ambrose v. Evelyn*, L. R. 11 Ch. D. 759.

"Not less than 10 days."—As to computation of time, see O. III.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

For form of notice of trial, see Forms, No. 27.

For form of *præcipe* to enter for trial, see Forms, No. 89.

*Countermand.*—Under the former Common Law practice a notice of trial could be countermanded at any time prior to four days before the trial, R. S. O., c. 50, s. 245. In Chancery a notice of hearing could not be countermanded, *Milne v. Lamson*, 6 P. R. 281 (note). O. XXXVI., r. 13, of the English Orders provides that no notice of trial shall be countermanded except by consent or by leave of the Court or a Judge. The present rules are silent as to a countermand. For the practice in case of conflict between the former practices where there is no new provisions, see notes to sec. 12 of the Act. It will be an easy matter, however, to protect oneself against a countermand, for a counter notice of trial may be given and this cannot, it is presumed, be countermanded by the opposite party.

## 256.

3. Subject to the provisions of the Act and of the preceding Rules, the Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes, or that one or more questions of fact be tried before the others, and may appoint

the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others. **O. XXXI. R. 3.**

By the English O. XXXVI., r. 3, the plaintiff may select one of the various modes of trial: before a Judge or Judges, before a Judge sitting with assessors, before a Judge and jury, or before an official or special referee, with or without assessors; but the defendant may, if he give a notice to that effect, have an action tried by a Judge and jury. The above rule is a copy of the English O. XXXVI., r. 6.

In an action against several defendants involving various issues, the plaintiffs having applied for an order for two simple issues to be tried as between themselves and two of the defendants before the rest of the action, the Court made the order on the plaintiffs undertaking not to seek relief against the said two defendants in respect of any cause of action other than that covered by the issues so to be tried, and also discontinuing such portion of the action as the Court should direct, *Emma Silver Mining Co. v. Grant*, 11 R. 11 Ch. D. 918. In giving judgment in above case, Jessel, M. R., said:—"I do not intend to lay down a general rule for the proper construction of Order XXXVI., rule 6, (Ont. Act, O. XXXI., r. 3,) because, first of all, I think one Judge has no right to embarrass other Judges by laying down general rules of construction; and, in the second place, I think it is very undesirable to limit the operation of a rule expressed in general terms by stating the circumstances, or all the circumstances, under which the Judge thinks the discretion ought to be exercised. The discretion is general. Of course it is a judicial discretion, and there must be sufficient reason for exercising it; but what I intend to do is to state one or two cases in which I have been asked to put the rule in force, and what I have done and why; and then I shall state why I think I ought to put the rule in force in the present instance. I have been asked to do so in the case of a defendant. The first case that came before me was a case in which a lady alleged that she was the legitimate child of somebody, and that as such she was entitled to take some very long and expensive and intricate accounts against some trustees. The trustees shewed by affidavit that the lady was born before the marriage of her parents, and that there were very strong grounds for supposing that she was not a legitimate child at all. I thought it a proper case, inasmuch as the expense of taking the accounts would have been enormous, and the whole suit would have ended in nothing but costs if the plaintiff did not establish her legitimacy, for the issue of legitimacy or illegitimacy to be tried first under this rule. I so directed, and, as I am informed, the result was that the lady did not succeed in establishing her legitimacy, and there was an end to the action, which was exactly what I anticipated. In a case of this kind my opinion is that the Judge must have some evidence which will make it at least probable that the issue will put an end to the action. The plaintiff is not to be harassed at the instance of the defendant by a series of trials, each trial taking issue on every link of the plaintiff's case. That is not the meaning of the rule as I understand it, but it may properly be applied in such a case as that I have stated, where the Judge has serious reason to believe that the trial of the issue will put an end to the action. I have had a case in which the plaintiff alleged a very long title to and claimed an estate. He alleged himself to be heir-at-law of a person who was entitled to this estate. He wanted a great deal of discovery, and the possession of a very large property. The defendant said that the plaintiff was a pauper, that it was a mere experimental action, and that there was not a shadow of ground for his claim. In that case I felt no hesitation in directing an issue whether the man was the heir-at-law. It turned out that he was not, and I believe the case was abandoned and was never tried at all. There was a third case I remember before me at the Chambers—I only give these instances as illustrations—in which a man brought an action on behalf of himself and all other the tenants of a manor to restrain the inclosure of a common. The defendant said 'This will be a very expensive action to try; it will involve the customs of the manor as to the rights of the common,' and that as usual, they had put up a man, who, although not technically, was really a pauper, to sue on behalf of himself and all others, the only result of which action could be that the defendants, if successful, would have to pay the costs out of their own pockets. They alleged and proved by affidavit that the person who was plaintiff, and who said he was tenant of the manor, was not so, and that his name or the name of his ancestors had never appeared on the Court rolls of the manor. The only answer that I could get from the plaintiff was that he believed he was a tenant, but he could not shew how. I thought, before the defendants were put to the enormous expense of a trial of all the issues, it was right to put the plaintiff to the

**G. XXXI.**  
**H. 3.**

proof that he was a tenant at the time when the action was brought. But I do not remember before having an application on the part of the plaintiff, and, as far as I can learn from the inquiries I have made, no one else is aware of any such case. Now it appears to me that when the plaintiff makes the application different considerations arise. The defendant has, of course, a right to shape his own case, and to say to the plaintiff, 'You must prove every part of your case. If I can put my finger on one part of your case and shew that there is no foundation for it whatever, it is quite wrong to subject me to the whole expense of a protracted investigation, and especially when you, the plaintiff, cannot pay the costs of it.' But when a plaintiff has chosen to frame his case in this way and has chosen to join several defendants, because they are more or less connected with some part of the subject matter of the action, although not connected with the whole of it, that is the mode in which he has elected to frame his case for his own convenience, and it does not then at all follow as a matter of course that he is at liberty to retire from it, as to any portion of the case, and say, 'I should like to try one part of it only, and to leave the defendant afterwards to be subject to a second or third trial to try the rest of it.' I think the defendant has, speaking generally, a right to answer, 'You ought to have thought of this before you brought your action or put in your statement of claim. If you wanted any part of the action to be tried separately, you should have brought a separate action.' I do not wish to be understood as saying that subsequent events may not have occurred which may justify the plaintiff in making the application, but subject to that, it appears to me, as a general rule, that the plaintiff has no right to make the application if the defendant objects. But if the plaintiff comes into Court and says this, 'Since the commencement of my action subsequent events have occurred which convince me that I had much better give up the right of action as against particular defendants, and limit my action to the trial of certain issues only, and ask the Court to try those issues,' it does not appear to me the defendants have any right to complain. There will be only one trial, therefore there will be no increased costs; and, as against those defendants, they get the benefit of the abandonment of the further relief asked against them, because the plaintiff says that he will limit his relief to what will result from the issues which are to be tried. So far as those defendants are concerned it must be a benefit—that is a benefit in one sense only, a benefit theoretically, because practically it is no benefit—and if they are wrong the sooner the action is tried against them the worse for them, and the greater the delay the better for them; but I am not now putting it in that way at all."

An application to have one issue in an action tried before another can only be granted on very special grounds. Where a defendant in a partnership action set up, by counter-claim, an agreement by the plaintiff for sale to the defendant of his (the plaintiff's) interest in the partnership at a stated price:—Held, that the defendant was not entitled to have the issue raised by his counter-claim tried before the plaintiff's issues in the action, *Piercy v. Young*, L. R. 15 Ch. D. 475.

In *Dent v. Sovereign Life Assurance Company*, W. N. (1879) 33, an action was brought to try the validity of a policy of assurance on the plaintiff's life, granted by the defendant company in September, 1877, the validity of which was disputed by defendants on the ground that it was obtained by the misrepresentation of the assured as to his health and habits. After the plaintiff had given notice of trial, he asked that the issue, whether the assured was a man of temperate or (as alleged by the defendants) of intemperate habits, might be tried in Middlesex by a Judge and jury and that the trial of the other issues might stand over in the meantime. The Vice-Chancellor refused the motion with costs. The plaintiff had already given notice of trial in a particular manner; no sufficient reason for changing his option was assigned; and the particular issue could not be severed from the rest of the case so as to admit of being heard separately by a jury.

*Discretion not interfered with on appeal.*—The plaintiff brought an action in the Chancery Division to set aside an agreement, on the ground that he had been induced to enter into it by the fraudulent representations of the defendant. The pleadings being closed, the plaintiff gave notice of trial by jury. The defendant thereupon moved that the action might be tried by the Judge without a jury. The Vice-Chancellor having held that the case might be so tried:—Held on appeal that the discretion of a Judge as to the mode in which an action attached to his branch of the Court can be most conveniently tried, will not be interfered with, except in a very strong case, *Ruston v. Tobin*, L. R. 10 Ch. D. 558.

## 257.

4. Every trial of any question or issue of fact by a jury **O. XXXI.** shall be held before a single Judge, unless such trial be specially **R. 4.** ordered to be held before two or more Judges.

See Eng. R. Sup. C., O. XXXVI., r. 7.

One counsel only will be heard on each side upon the trial of a question of fact, *Conington v. Gilliat*, L. R. 1 Ch. D. 694.

## 258.

5. Notice of trial shall state whether it is for the trial of the action or of issues therein; and the place and day for which it is to be entered for trial. It may be in the Form No. 27 in Appendix (B), with such variations as circumstances may require.

See Eng. R. Sup. C., O. XXXVI., r. 8.

## 259.

6. Ten days' notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be 5 days' notice.

See Eng. R. Sup. C., O. XXXVI., r. 9 (e).

By the Common Law Procedure Act, R. S. O. c. 50, s. 244, the notice of trial was eight days, the first and last days being inclusive, two days, being by s. 58 added where the notice was served upon the Toronto agent of the attorney. In Chancery the notice of trial was fourteen days, G. O. Chy. No. 163, and that meant fourteen clear days, *Beard v. Gray*, 3 Ch. Ch. R. 104. The notice of hearing of causes set down by way of motion for decree, on bill and answer, for argument of demurrer on appeal from Master's report or for re-hearing, was seven days, G. O. Chy. No. 410.

"10 days."—As to computation of time, see O. LII.

"Unless otherwise ordered."—The Court or a Judge has power to enlarge or abridge the time appointed by the rules for doing any act or taking any proceedings, O. LII., r. 8.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

## 260.

7. Notice of trial shall be given before entering the action for trial.

See Eng. R. Sup. C., O. XXXVI., r. 10.

Either party may give notice of trial, O. XXXI., r. 2; or enter the action for trial, *Id.*, r. 3.



## 261.

**O. XXXI.  
R. 8.**

8. After notice of trial is given either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

See Eng. R. Sup. C., O. XXXVI., r. 15.

## 262.

9. On the day before the day for holding the Court at which the action is to be tried, the party entering the action for trial shall deliver to the proper officer one copy of the whole of the pleadings in the action, for the use of the Judge at the trial, such copy to be certified as a true copy by the officer having charge of the pleadings filed.

See Eng. R. Sup. C., O. XXXVI., r. 17; Eng. R. Sup. C., Dec. 1875, r. 14.

Formerly in Chancery the Judge used the original papers on the files of the Court. In Common Law, however, a record was prepared for the use of the Judge. In England two copies of the pleadings have to be filed at the time of entering the action. Eng. R. Sup. C., O. XXXVI., r. 17; Dec. 1875, r. 14.

## 263.

10. Where the Judges consider that public convenience so requires, provision may be made for the trial at a separate time, or before another Judge, of the actions from the Chancery Division.

## 264.

11. Actions in all the Divisions shall be entered not later than the third day next before the first day of the Assizes or sittings; but the Judge may permit any action to be entered after the time above limited, if upon facts disclosed on affidavit, or on the consent of both parties, he sees fit to do so. This Rule shall be construed to apply to County Courts.

See R. S. O., c. 50, s. 248.

"*Not later than the third day.*"—As to computation of time, see O. LII. Under the former Chancery practice causes had to be entered 14 days prior to the sittings. In Common Law records might be entered up to noon of the commission day, but not prior to 4 days before the commission day, R. S. O., c. 50, s. 245.

## 265.

12. Where the Deputy Clerk of the Crown and Deputy Registrar in any County are not the same person, all actions shall be so entered with the Deputy Clerk of the Crown, except in cases under Rules 10 and 13, but the Deputy

Registrar shall attend the trial of actions brought in the Chancery Division, and shall be entitled to the same fee as if the cause had been set down with him for hearing. **O. XXXI. R. 12.**

See sec. 64 of the Act as to Deputy Clerks and Deputy Registrars.

## 266.

13. In case of provision being made for the trial at a separate time and place of actions brought in or assigned to the Chancery Division, the actions shall be entered for trial with the Registrar, or Deputy Registrar, as the case may be, according to the present practice of the Court of Chancery.

## 267.

14. The party entering any action for trial shall indorse on the copy of the pleadings delivered as aforesaid, whether the matter for trial is an assessment of damages, or an undefended issue, or a defended issue; and the officer with whom the action is so entered shall make two lists, and enter each action in one of the said lists, in the order in which the actions are entered with him; and in the first list he shall enter all the assessments and undefended issues, and in the second list all defended issues, and the Judge at the trial may call on the actions in the first list at such time and times as he finds most convenient for disposing of the business.

See R. S. O., c. 50, s. 249.

## 268.

15. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.

See Eng. R. Sup. C., O. XXXVI., r. 18.

"*The burden of proof.*"—The wide distinction between the English and Ontario system of pleading must here be observed. In England a defendant by his statement of defence simply "put the plaintiff to proof of his several allegations in his statement of claim." He did not appear at the trial, but service of notice of trial on him was proved.—Held, that the defendant had admitted the facts alleged in the statement of claim, and that the plaintiff was entitled to judgment without adducing any evidence in support of his case, *Harris v. Gamble*, L. R. 7 Ch. D. 877. This case is no doubt founded upon the English rule that every statement not denied is to be taken as admitted. In Ontario, however, any statement not denied is deemed to be denied if not admitted. The authority quoted would no doubt be inapplicable to the Ontario practice, see O. XV., r. 24; see *Hakewell v. Webber*, 9 Ha. 641; *Brown v. Smith*, 5 Jur. 1195; *Hughes v. Jones*, 26 Beav. 24.

When a defendant does not appear at the trial it is not necessary for the plaintiff to prove service of notice of trial; the power of the Court to set aside the proceed-

**O. XXXI.  
R. 15.**

ings is a sufficient protection, *Chorlton v. Dickie*, L. R. 13 Ch. D. 160; and see cases in notes to next rule.

If a party appealing from the decision of a Judge at Chambers does not appear in the High Court to support the motion, and judgment is therefore pronounced against him in his absence, he cannot afterwards appeal to the Court of Appeal against the judgment of the High Court. The Court of Appeal has no jurisdiction to afford him relief, *Walker and others v. Budden*, L. R. 5 Q. B. D. 267.

## 269.

16. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim he may prove such claim so far as the burden of proof lies upon him.

See Eng. R. Sup. C., O. XXXVI., r. 16.

In Chancery if the cause is called on to be heard, and the plaintiff makes default, and by reason thereof the bill is dismissed, the dismissal is to be equivalent to a dismissal on the merits, unless the Court orders otherwise, and may be set up in bar to another suit for the same matter, G. O. Chy. No. 184. Before the bill was dismissed it was necessary to produce an affidavit proving that notice of the hearing had been served, *Rigg v. Wall*, 3 M. & C. 505; but see *Charlton v. Allen*, 9 Ha. app. 67; *Bell v. Hornby*, 14 Beav. 439. Under this rule, however, when an action is called on for trial and the plaintiff does not appear the defendant is entitled to have judgment in his favour with costs, without proving that he had been served with notice of trial, *James v. Crow*, L. R. 7 Ch. D. 410; overruling *Cockle v. Joyce*, L. R. 7 Ch. D. 56; and see *re Lows*, L. R. 7 Ch. D. 160; and see *Chorlton v. Dickie*, L. R. 13 Ch. D. 160.

After issue had been joined and notice of trial given by the sole plaintiff in an action he filed a liquidation petition under which a trustee of his property was appointed. When the action came on for trial no one appeared for the plaintiff or for the trustee, and there was no evidence that any notice of the action had been served on the trustee:—Held, that Order XLIV., r. 1, applies only when the cause of action survives or continues in some person who is before the Court, and that the only order which could be made was to strike the cause off the list, *Mildridge v. Burgess*, L. R. 7 Ch. D. 411; and see *Chorlton v. Dickie*, L. R. 13 Ch. D. 160.

When a case was called on no counsel had been instructed for the plaintiff and no papers had been delivered. The defendant appeared and the bill was dismissed with costs. Subsequently, counsel appeared for the plaintiff and asked that the cause might be restored to the paper, and stated that one of the firm of solicitors engaged for the plaintiff had been seriously ill, and the other partner was not acquainted with the facts of the case, and inadvertently omitted to make the necessary arrangements for the hearing. *Malins, V.-C.*, said that to refuse to reinstate the cause might do great injustice, and he allowed it to be restored to the paper on payment of costs of the day and the costs of this application, *Birch v. Williams*, W. N. (1876) 168.

When an action which had been made a test action (for the purpose of deciding the rights of the plaintiffs in a number of similar actions against the same defendants) came on for trial, the plaintiff declined to proceed, on the ground that he was not in a fit state of health to attend and be examined as a witness. On a previous occasion he had moved for and obtained a postponement of the trial on the ground of his ill-health. A week before the trial an application by the plaintiff, in Chambers, to stay all proceedings in the action had been refused by *Malins, V.-C.*, on the ground that the plaintiff was not *dominus litis*, but a trustee for the plaintiffs in other actions. At the trial, the plaintiff asked for a postponement, or that an order of discontinuance might be made under O. XIX.—Held, that the Court could not regard the rights of the plaintiffs in other actions, but must act as if the plaintiff had not appeared at the trial, and must dismiss the action with costs, *Robinson v. Chadwick*, L. R. 7 Ch. D. 878.

## 270.

17. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit; such application may be made at the Assizes or sittings at which the trial took place, or in Toronto.

See Eng. R. Sup. C., O. XXXVI., r. 20.

"*May be set aside.*"—Where a judgment obtained through the plaintiff's default in appearing is set aside, it will be on payment of the costs of the day and of the application, *Cockle v. Joyce*, L. R. 7 Ch. D. 56. A defendant was not represented at the trial of an action because his solicitor was ignorant of the fact that in pursuance of an order of the Lord Chancellor the action had, with others, been transferred from one Judge of the Chancery Division to another, and therefore only watched the list before the former Judge, the judgment was set aside on payment of the costs of the day and of the application, but not of the appeal in which he was successful, *Burgoine v. Taylor*, L. R. 9 Ch. D. 1.

Where a defendant had instructed a solicitor to enter appearance and defend an action, and the solicitor, after entering appearance, neglected the action, and allowed it to come to trial without communicating with the defendant or appearing or instructing counsel to appear at the trial, and the defendant did not ascertain that the action had been tried and judgment recovered against him with costs, until more than six days after the trial, he personally having been guilty of no negligence, and having made an application for enlargement of the time within six days of his having heard that the trial had taken place, the Court granted an extension of the time to enable him to apply to set aside the judgment, *Mitchell v. Wilson*, 25 W. R. 380.

Where a plaintiff, against whom judgment by default had been given, applied to have the judgment set aside and the action restored to the trial list, on the ground that his solicitor, acting under a belief that the action was some way down in the cause list, and that negotiations which were then going on would result in a settlement of the action, had deferred instructing counsel to appear:—Held, that the circumstances were sufficient to justify the Court in setting aside the judgment and restoring the action to the list, on the payment, by the plaintiff, of the costs of the day and of the application, *Wright v. Clifford*, 26 W. R. 369.

And as to cases in which the client will be relieved from embarrassment caused by the negligence of his solicitor, see notes to sec. 38 of the Act.

It is incumbent on the Court to take care that the same subject should not be put in a course of repeated litigation; and that, with a view to the termination of a suit, the necessity of using reasonably active diligence in the first instance, should be imposed upon parties. Where, therefore, a defendant did not appear at the hearing of the cause, and a decree was pronounced in favour of the plaintiff, and three months afterwards the defendant applied to open publication, so as to let in proof of a document of the existence of which he was aware, and a copy of which he had in his possession, the Court, under the circumstances, refused the application with costs, *Colonial Trusts v. Cameron*, 21 Gr. 70.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

## 271.

18. Where, through accident or mistake or other cause, any party omits or fails to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved at such time, and subject to such terms and conditions as to costs and otherwise, as the Judge shall direct; and if the case is being tried by a jury, the Judge may direct

O. XXXI.  
R. 18.

the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed; and if not so proved, judgment is to be entered for the opposite party, unless the Court or a Judge otherwise directs. This Rule shall not apply to an action for libel.

There is no provision in the English practice similar to this.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

## 272.

19. The Judge, if he think it expedient for the interest of justice, may postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

See Eng. R. Sup. C., O. XXXVI., r. 21; R. S. O., c. 50, s. 259.

The Courts have always exercised the right to postpone the trial of an action in consequence of the absence of a material witness, when the application is made before the day of trial, and on sufficient affidavits, *Thompson v. Lewis*, 2 C. L. R. 707; *O'Keefe v. O'Brien*, 2 L. J. 231. The power of adjournment on the day of trial, when necessary in the interests of justice, was given by the Common Law Procedure Act, 1856, 19 Vic. c. 48, s. 158, and is continued by this Order.

*Absence of Witness.*—When a cause is postponed on account of the absence of a necessary witness, and diligent efforts to secure the attendance of such witness who is residing within the jurisdiction are shewn to have been made, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases the costs will be disposed of according to circumstances, and in the discretion of the Judge, *Pattison v. McNab*, 12 Gr. 483. But where the plaintiff ascertained on Sunday that a witness who was his mother, was confined to her bed and unable to attend at the sittings which began on the Tuesday following, but failed to give notice of this fact to the defendant, a motion made by the plaintiff to postpone the hearing was granted only on the terms of his paying the costs, *McMillan v. McDonald*, 22 Gr. 362. On an application to put off a trial on the ground of the absence of a witness it is not sufficient to shew that the witness is material, and may, and probably will, give important evidence, or to swear that his evidence will be material and necessary, without shewing that it will assist the case of the person making the application, *Kerr v. Grand Trunk Railway Company*, 4 P. R. 303.

*Adjournment to allow parties to be added.*—Where at the hearing of a cause it appeared from the plaintiff's evidence that certain persons named in the will of the ancestor of the plaintiff were necessary parties, and had not been brought before the Court, leave was given to the plaintiff to amend by adding those parties, notwithstanding the fact that the effect of permitting such amendment would be to enable the plaintiff to vary to some extent the case made and the relief prayed, though not to vary the case or to pray any different relief as against the present defendants; and as the defect of parties did not appear by the bill:—Held, that leave could only be granted on payment of the costs of the day, *Chisholm v. Sheldon*, 1 Gr. 108.

The party who applies for the adjournment must pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for the costs of the day, *Lydall v. Martinson*, L. R. 5 Ch. D. 780.

Where it is plain on the face of a bill that a suit is defective for want of parties, a defendant, raising the objection at the hearing, is entitled to the costs of the day, although he may not have taken the objection by his answer, as it is the duty of the plaintiff to make his suit perfect and not the duty of the defendant to give notice of the objection, per *Jessel, M. R.*, *Rowell v. Morris*, L. R. 17 Eq. 20. But when a bill is filed against a trustee by parties claiming adversely to his *cestui que trust*, without making them parties to the bill, it is the duty of the trustees to object that the owners of the estate are not before the Court; where therefore a trustee under such circumstances neglected to make the objection, the cause was notwithstanding ordered to stand over, with leave to amend by

adding parties, without costs, *Cleveland v. McDonald*, 1 Gr. 415. Where the Court finding it impossible to make such a decree as was desired, as the record then stood, adjourned the cause so that the plaintiff might amend his bill by adding parties, the order was made without costs, the objection not having been raised by the defendant, *Rogers v. Rogers*, 2 Gr. 137. After the plaintiff had entered the record for trial the defendant took out an order staying proceedings until security for costs were given, whereupon the record was withdrawn:—Held, that the defendant was not entitled to costs of the day, *Fitzgerald v. Ludwig*, 7 P. R. 187. The inability properly to calculate the damages to the plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, is a sufficient ground for postponing the trial, *Speers v. Great Western R. W. Co.*, 6 P. R. 170. The usual undertaking given by the plaintiff on obtaining the order for interim alimony (viz., to proceed to a hearing at the first possible sittings), was extended to the next sittings, where the defendant had failed, and wilfully refused to pay interim alimony and disbursements which he had been directed to pay, *Bowslaugh v. Bowslaugh*, 6 P. R. 200.

An order having been made by a Judge in Chambers postponing the trial on payment of the costs of the application only, the Court refused to vary the order, so as to compel payment of the costs of preparing for the trial, although they thought the order should have been so made in the first instance, no notice having been given of the intention to move, *McKenzie v. Stewart*, 10 U. C. R. 634. Applications to postpone trial in outer counties should not be entertained in Toronto when trial just coming on, *Id.*

As to the power of a Judge to order the postponement of an interpleader issue, when the interpleader order directs it to be tried at a particular sittings, see *Robinson v. Richardson*, 32 U. C. Q. B. 344.

*Interests of Justice.*—As to this, see *Whitelaw v. National Insurance Co.*, 13 U. C. L. J. N. S. 199.

## 273.

20. Upon the trial of an action, the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration.

See Eng. R. Sup. C., Dec. 1876, r. 3; R. S. O., c. 50, s. 262.

“Direct that judgment be entered.”—For forms of judgment in such a case, see Forms, Nos. 155, 156, 157. If no direction is given judgment must be obtained upon motion, see O. XXXVI.

## 274.

21. The Registrar, Clerk of Assize or other officer present at the trial shall enter all such findings of fact as the Judge may at the trial direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, such entry to be made in a book to be kept for the purpose, and also to be indorsed on the copy of the pleadings delivered under Rule 9 of this order.

See Eng. R. Sup. C., O. XXXVI, r. 23.

## 275.

22. The said indorsement, or the certificate of the said officer or the certificate of the Judge, shall be a sufficient authority to the proper officer for entering judgments to



**O. XXXI.  
R. 22.**

enter judgment accordingly. The certificate may be in the Form No. 174 in Appendix (I) hereto.

See Eng. R. Sup. C., O. XXXI., r. 24.

## 276.

23. Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the Court or a Judge, hold the trial at, or adjourn it to, any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors if any, which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem* in a similar manner as in actions tried by a jury.

See Eng. R. Sup. C., O. XXXVI., r. 30.

"*Referred to a Referee.*"—See s. 47 *et seq.*, and notes as to power of referee; see also O. XXIX., r. 2.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

By G. O. Chy. No. 214, as soon as the Master has entered upon the hearing of a reference he is to proceed therewith to the conclusion without interruption, where that is practicable; and when any reference cannot be concluded in a single day, the Master is to proceed *de die in diem*, without a fresh warrant, unless he is of opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of justice; and when an adjournment is ordered the Master is to note in his book the time and reason thereof.

Order XXXVI., rule 30 (Ont. Act. O. XXXI., r. 23), of the Rules of Court under the Judicature Acts, relating to trials by referees, is directory only. Therefore, where a special referee did not sit *de die in diem*, as prescribed by that rule, the Court refused to set aside the award, *Robinson v. Robinson*, 35 L. T. N. S. 337.

## 277.

24. Subject to any order to be made by the Court or Judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpoena, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a Judge of the High Court, but not so as to make the tribunal of the referee a public court of justice.

See Eng. R. Sup. C., O. XXXVI., r. 31.

## 278.

25. Subject to any such order as last aforesaid, the referee shall have the same authority in the conduct of any reference or trial as a Judge of the High Court when presiding at any trial before him.

See Eng. R. Sup. C., O. XXXVI., r. 32.

As to powers of Referees, see s. 47 *et seq.* and notes, and O. XXIX., r. 2.

## 279.

26. Nothing in these Rules contained shall authorize any referee to commit any person to prison or to enforce any order by attachment or otherwise. **O. XXXI. R. 26.**

See Eng. R. Sup. C., O. XXXVI., r. 33.

## 280.

27. The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct.

See Eng. R. Sup. C., O. XXXVI., r. 34, as amended by Eng. R. Sup. C., March, 1879, r. 5; R. S. O., c. 50, s. 211.

## 281.

28. The Court shall have power to require any explanations or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration, to the same or any other referee; or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence, as the Court may direct.

See Eng. R. Sup. C., O. XXXVI., r. 34.

The Referee acts in a *quasi* judicial capacity, and is not to be examined in the action, *Broder v. Saillard*, L. R. 2 Ch. D. 692.

The old law and practice with regard to references to arbitration are not abolished by the Judicature Act, and, consequently, where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the Court with regard to the matter referred to him, but his decision is final, *Cruikshank v. The Floating Swimming Baths Co.*, L. R. 1 C. P. D. 260.

Where a Judge has referred the amount of damages in an action to a Special Referee, he may accept it wholly or partially, or, if dissatisfied with it, he may wholly disregard it, or remit it to the Referee for amendment; but he has no power to alter or vary it, *Dunkirk Colliery Co. v. Lever*, L. R. 9 Ch. D. 20.

## ORDER XXXII.

## EVIDENCE GENERALLY.

## 282.

O. XXXII.  
R. 1.

1. In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages, shall be examined *viva voce* and in open Court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with, be examined before an examiner; provided that where it appears to the Court or Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

See Eng. R. Sup. C., O. XXXVII., r. 1; G. O. Chy. No. 176.

"Any agreement."—The agreement must be a formal agreement in writing, *New Westminster Brewery Co. v. Hannah*, L. R. 1 Ch. D. 278.

The guardian *ad litem* of an infant defendant is competent to give a consent requisite for taking the evidence by affidavit, *Knatchbull v. Fowle*, L. R. 1 Ch. D. 604.

Where the parties agreed that evidence should be taken by affidavit, this was held equivalent to an agreement that the action should be tried without a jury, since affidavits could not otherwise be used except under special circumstances, *Brooke v. Wigg*, L. R. 8 Ch. D. 510.

"Any action."—Where, in a pending case, replication was not filed nor notice of motion for service given before the Judicature Act came into force, the Court has not the power, except on the consent of the parties, to direct that the evidence should be taken otherwise than *viva voce*, *Pattison v. Wooler*, L. R. 1 Ch. D. 464; but the Court can direct a party who unreasonably refuses to consent to have the evidence taken by affidavit, to pay the costs of the parties who moved for leave to do so, *Pattison v. Wooler*, L. R. 2 Ch. D. 536.

## 283.

2. Upon any motion, petition or summons, evidence may be given by affidavit; but any person having made an affidavit to be used, or which shall be used on any motion, petition or other proceeding before the court, shall be bound to attend for the purpose of being cross-examined, on being served with a writ of subpoena *ad testificandum*, but the court, nevertheless, may act on the evidence before it at the time, and may make such interim order, or otherwise, as appears necessary to meet the justice of the case.

See Eng. R. Sup. C., O. XXXVII., r. 2; G. O. Chy. No. 268.

Each statement in an affidavit, which is to be used as evidence on any proceeding before the Court, or before a Judge, or before an officer of the Court, is to shew the means of knowledge of the person making the statement, G. O. Chy. No. 259. **O. XXXII. R. 2.**

Where there is no personal knowledge, the words "I am informed" are the same as "I believe," *Woodhatch v. Freeland*, 11 W. R. 398.

See also as to evidence by affidavit, O. XXXIV.

Scandalous affidavit taken off the files, *Goddard v. Parr*, 24 L. J. Ch. 783; *Kernick v. Kernick*, 12 W. R. 335; scandalous matter expunged, *re Bailey's Settlement*, 3 W. R. 133. See Ord. XXIII., r. 1.

"Affidavit."—As to form of affidavits, see rule 3 of this Order. As to filing affidavits, cross-examination on, etc., see O. XXXIV.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Desires the production of a witness."—Where one party desires the production of a witness for cross-examination, the Court has no power to order an affidavit, used on a previous application, to be read at the trial, *Blackburn Union v. Brooks*, L. R. 7 Ch. D. 68.

Forms.—For form of subpoena *ad testificandum*, see Forms, No. 99. For form of subpoena *duces tecum*, see Forms, No. 102. For form of *precipe* for *Habeas Corpus ad testificandum*, see Forms, No. 91. For form of *Habeas Corpus ad testificandum*, see Forms, No. 104. For form of order for examination of witnesses before trial, see Forms, No. 133.

## 284.

3. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter or copies of or extracts from documents, shall be paid by the party filing the same.

## 285.

4. The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein, on such terms, if any, as the Court or Judge may direct.

See Eng. R. Sup. C., O. XXXVII., r. 4; G. O. Chy. Nos. 266—269.

Hitherto in Chancery a party to a cause might by a writ of subpoena *ad testificandum* or *duces tecum* require the attendance of a witness before the Court, or before a Master or an Examiner, for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court, G. O. Chy. No. 266; but no evidence to be used at the hearing other than the examination of a party was to be taken, unless by an order first obtained upon special grounds, G. O. Chy. 166. And in Common Law it was necessary to obtain an order, R. S. O., c. 50, s. 179.

The present rule is probably intended to apply to evidence for use upon motions as well as at the trial (note the heading of the order, the fact that the rules deal with evidence both at the trial and upon motions, and the fact that one of the

**O. XXXII.**  
**R. 4.**

references at the foot of the rule under consideration in the Act, as issued for consideration, was to G. O. Chy. Nos. 266—269, which deal with examination of witnesses upon motions). Orders for commissions are separately provided for by O. XXXIII.

*De bene esse.*—A witness's depositions *de bene esse* not taken down by the examiner specially appointed in his own handwriting, but taken down in the presence of the parties, and certified by the examiner to have been read over to the witness and signed by her in his presence, were ordered to be filed, *Bolton v. Bolton*, L. R. 2 Ch. D. 217. The examination of a witness *de bene esse* is permitted where there is danger of losing the testimony of an important witness from death, by reason of age (as where the witness is seventy years old and upwards), or dangerous illness, or where he is the only witness to an important fact. Where the reason for the application is that the witness is dangerously ill, or over seventy years of age, the order may be obtained *ex parte*, *McKenna v. Everitt*, 2 Beav. 188; *Oliver v. Dickey*, 2 Ch. Ch. R. 87; but unless the illness is dangerous notice must be given, *Anderson v. Anderson*, 1 Ch. Ch. R. 291; so where the application was made because the witness was about to leave the jurisdiction, an *ex parte* order was refused, *Larly v. McGill*, 1 Ch. Ch. R. 257. Where a material witness is going abroad it is a matter of course, upon the application of a party to the cause, to make an order for his examination *de bene esse*, *Grove v. Young*, 3 D. & S. 397. On an application for an order to examine *de bene esse* on the ground that the witness is the only one who can prove a fact, affidavits should be produced shewing the particular facts as to which he can give evidence, and that he is the only witness, *Pearson v. Ward*, 1 Cox, 177; *Hope v. Hope*, 3 Beav. 317. Affidavits on information and belief, without shewing grounds of belief, insufficient, *Jameson v. Jones*, 3 Ch. Ch. R. 98. The plaintiff may, in a proper case, obtain an order for the examination of a witness *de bene esse* as soon as his bill is filed, *Dew v. Clarke*, 1 S. & S. 108; but a defendant cannot obtain such an order till he has answered, *Williams v. Williams*, 1 Dick. 92. All parties are entitled to notice of the time and place of examination, *Loveden v. Milford*, 4 Bro. C. C. 540.

In *Coe's Practice of the Judge Chambers*, 109, it is said that an order may be made *ex parte* on an affidavit of solicitor to the party applying, stating—

1. That A. B. is a necessary and material witness on behalf of the [plaintiff or defendant].
2. That he is unable to give evidence in open Court by reason of [any special reason, such as illness, the nature of which must be stated, or necessarily leaving the country].
3. Praying that he may be examined before C. D., or, if abroad, that a commission may issue.

The order requires notice to be given to the opposite solicitor of the time and place of examination, and further, that the examination, when taken, be filed with the Masters of the Court; and provides that an office copy may be read and given in evidence on the trial of the cause, saving all just exceptions. Proof of continued absence or illness must be given at the trial, and for this purpose the affidavit of the solicitor is deemed sufficient.

## ORDER XXXIII.

### COMMISSIONS TO EXAMINE WITNESSES.

#### 286.

**O. XXXIII.**  
**R. 1.**

1. Upon an application for a commission to take evidence, the applicant is in the notice of motion to state the name of the commissioner to whom he desires the commission to be issued; and where the opposite party desires to name another commis-

sioner, he is, on the return of the motion, to give notice to the applicant of the name of any other commissioner. O. XXXIII. R. 1.

It has hitherto been the practice in Chancery first to obtain the order for a commission, and then to strike commissioners' names before the Clerk of Records and Writs.

*When granted.*—In June, 1876, in a case of *Grant v. Banque Franco-Egyptienne*, 26 W. R. 3, Brett, Grove, and Lindley, JJ., approved of the exercise of his discretion by Mr. Justice Lindley at Chambers, where he refused a commission to examine French witnesses as to French law, the witnesses not being named; and Brett, J., said: "I apprehend that the granting of a commission is a matter of discretion, and that the grounds on which a commission is granted or refused is always a matter of comparison, namely, whether it is more convenient that the commission should go than that witnesses should be examined before the tribunal here, and the exercise of that discretion depends upon the circumstances of each particular case."

A commission for the examination of a party to the cause on his own application will not be granted unless it is clearly shewn that the commission would, under the circumstances, be conducive to the ends of justice, *Price v. Bailey*, 6 Pr. R. 256.

Issue was joined in an action on the 11th of June, and the same day it was set down for trial. On the 13th of November it was in the paper for trial, but on the plaintiff's application, with the consent of the defendants, the trial was postponed for a month. On the 13th of December the plaintiff gave notice of motion for the appointment of a commission to take the evidence of himself and another witness, who were in India, and that the trial might be postponed until the return of the commission. At the hearing of the motion on the 17th of December the defendant offered to consent to a postponement of the trial for two months, but this offer was declined:—Held, that the plaintiff was too late in making the application, and that, as he had refused the defendant's offer, the motion must be refused with costs, *Stewart v. Gladstone*, L. R. 7 Ch. D. 394.

The affidavit in support of a motion for a commission to examine witnesses at Paris and Boulogne for the defendant company stated that certain Frenchmen residing in Paris (named), and others residing in Paris and Boulogne (unnamed), were necessary witnesses. The defendant company was registered in England; their business was in Paris. The Court ordered the commission to issue on the defendants, if the plaintiff pressed it, adding to their affidavit a statement that great inconvenience and expense would otherwise be occasioned, *Spiller v. Paris Skating Rink Company (Limited)*, 27 W. R. 225.

*Further examination of witness.*—Where a witness who had been previously examined under a commission, stated on affidavit that he had further evidence to give, to correct or explain his former evidence:—Held, a new commission should issue to further examine him, and that in such case he should be considered as a witness for the party who desires to so re-examine him. Held, also, that strong suspicion of a depraved motive in the witness for desiring to be re-examined was not a sufficient ground upon which to resist the application, *Rogers v. Manning*, 3 Pr. R. 2.

*Costs of commission.*—In *Spiller v. Paris Skating Rink Company*, 27 W. R. 225, Malins, V. C., said:—"As to the costs of the commission, the company was a foreign one duly registered in London. If they had been plaintiffs perhaps they should have given security for costs, but they were defendants, and there was no suggestion that they were insolvent. Costs, therefore, must be reserved."

In *Colborne v. Thomas*, 4 Gr. 166, however, the costs of a commission issued by plaintiff to take evidence in a foreign country, were allowed to him as part of the costs of the cause.

In *Fox v. Toronto and Nipissing Railway Company*, 7 Pr. R. 157, it was said that the costs of executing a commission are entirely in the discretion of the Master; and where the amount paid to the commissioner and his clerk for two sittings on different days in London was twenty-two guineas, and the Master on taxation disallowed twelve, the Court refused to interfere.



## 287.

**O. XXXIII.**  
**R. 9.**

2. Upon the hearing of the motion the Court or Judge (or officer before whom the motion is made) may order the issue of the commission directed to the persons so named or to such other person or persons as may seem proper.

For form of order for commission, see Forms, No. 129.

For form of *præcipe* for commission, see Forms, No. 90.

For form of commission, see Forms, No. 103.

## 288.

3. The order or certificate for the issue of a commission is to state the name of the commissioner to whom it is to be directed, and whether the examination of witnesses thereunder is to be taken upon oral questions or upon written interrogatories, and also whether or not notice of the execution thereof is to be given to the opposite party; and in case notice is to be so given, then the name and the address of the person on whom such notice is to be served are to be stated in the order.

## 289.

4. The examination of witnesses under a commission is to be taken upon written interrogatories, and upon such oral questions as may be put by either party upon the subject matter of such interrogatories, or arising out of the answers thereto; or in case all parties consent, the examination may be had altogether upon oral questions. But all oral questions shall be reduced into writing and with the answers thereto returned with the commission.

## 290.

5. Where the examination is to take place upon written interrogatories, the interrogatories in chief are to be delivered to the opposite party (unless otherwise ordered) at least 8 days before the issue of the commission; and the cross-interrogatories are to be delivered to the opposite party (unless otherwise ordered) within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the opposite party may send the commission without cross-interrogatories.

"*Delivered.*"—If interrogatories can be called a proceeding, then O. XV., r. 26, may apply, which provides that the "delivery of a statement of claim or defence or other pleading or proceeding, when mentioned or referred to in these Orders, includes filing, where, by the practice of the Courts heretofore or under these Orders, such statement, pleading or proceeding might be filed."

It was held in *Darling v. Darling*, 8 P. R. 391, that when a foreign commission issues on the Master's Certificate under G. O. 221, cross-interrogatories should be filed in the office of the Clerk of Records and Writs; and where they were filed by a defendant in the Master's office, and notice of filing given, but by accident the commission was forwarded without them, an application made on the return of the commission executed, to suppress the depositions, was refused with costs.

O. XXXIII.  
R. 5.

"8 days before."—"Within 4 days."—As to computation of time, see O. LII.

*How questions objected to.*—The Referee made an order striking out as impertinent certain interrogatories to be administered to a witness under commission:—Held, on appeal, that the Referee has no jurisdiction to strike out interrogatories for impertinence. The proper course is for the witness to demur to the impertinent questions, *Williams v. Corby*, 8 Pr. R. 83. And see *Fisher v. Owen*, L. R. 8 Ch. D. 645.

## 291.

6. An examination may be executed *ex parte*, unless the opposite party shall, upon the hearing of the application for the order or Master's certificate for the issue of the commission, require notice of the execution of the commission, and give the name and place of abode of some person resident within two miles of the place where the commission is to be executed, upon whom notice may be served.

"*Master's Certificate.*"—G. O. Chy. No. 221 provided as follows:—Under an order of reference, witnesses may be examined before any examiner of the Court; and foreign commissions for the examination of witnesses without the jurisdiction of the Court, may, on the certificate of the Master, be issued by the Clerk of Records and Writs upon *præcipe*.

The certificate will not be given *ex parte*, *McLennan v. Helps*, 3 Ch. Ch. R. 193.

## 292.

7. Where notice of the execution of the commission is required to be served, 48 hours' notice shall be sufficient; such notice is to be in writing, stating the time and place of the intended examination, and is to be addressed to the person named for that purpose in the order or certificate for the issue of the commission; and service upon him, or upon a grown up person, at the address stated in the order or Master's certificate, shall be sufficient. If the name or address stated in such order or certificate shall prove to be illusory or fictitious, or if the party so notified shall fail to attend, pursuant to the notice, the commission may be executed *ex parte*.

"48 hours' notice."—As to computation of time, see O. LII.

## 293.

8. In the event of any witness on his examination, cross-examination or re-examination, producing any book, document, letter, paper or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy

**O. XXXIII.**  
**R. 8.**

thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extract, shall be annexed to the witnesses' deposition.

### 294.

9. Every witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion, by or before the said commissioners or commissioner.

### 295.

10. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *viva voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

On the facts set out in the judgment, it was held that the interpreter was not such an agent or correspondent of the complainant as would justify the suppression of the depositions on that ground, *Darling v. Darling*, 8 P. R. 391. The commissioner was an Italian and the instructions to him were in English:—Held, no objection, as it did not appear that the commissioner was unacquainted with the English language, *Id.*

### 296.

11. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

Where the instructions directed that the depositions must be subscribed by the witness, and a witness could not write, the commissioner certified to that fact, and the interpreter and commissioner signed their names:—Held, sufficient. It did not appear that the commissioner took down the evidence:—Held, immaterial under the instructions. The deposition of the claimant were taken by one commissioner, and those of a witness by another:—Held, also immaterial, *Darling v. Darling*, 8 P. R. 391.

### 297.

12. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the judge or officer on or before such day as may be ordered in that behalf,

enclosed in a cover under the seal or seals of the said commissioners or commissioner, and office copies thereof may be given in evidence on the trial of the action, by and on behalf of the said parties respectively, saving all just exceptions, without any other proof of the absence from this country of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the party, as to his belief of such absence.

**O. XXXIII.  
R. 19.**

### 298.

13. Where, upon the application for a commission to take evidence, the opposite party shall desire to join in the commission and examine witnesses on his own behalf thereunder, or shall name a commissioner, each party is to pay the cost of the commission consequent upon the examination of his witnesses and the appointment of his commissioner, without prejudice to the question by whom such costs are ultimately to be borne: and if for any reason the commissioner named by either party shall refuse to act in the execution of the commission upon receiving 48 hours' notice in writing from the other of them so to do, the commission may be executed by the commissioner giving such notice alone.

### 299.

14. The trial of the action shall be stayed until the return of the commission.

### 300.

15. Every order for a commission shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions, which the Court or Judge shall see fit to make.

## ORDER XXXIV.

### EVIDENCE BY AFFIDAVIT.

### 301.

1. In case the parties in any action consent to the evidence being taken by affidavit as between the plaintiff and the defendant, the plaintiff within 14 days after such consent has been given, or within such time as the parties may agree upon,

**O. XXXIV.  
R. 1.**

**O. XXXIV.**  
**R. 1.**

or a Judge in Chambers may allow, shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

See Eng. R. Sup. C., O. XXXVIII., r. 1.

"*Consent*."—The "consent" to the evidence being taken by affidavit under this Rule, must be a formal consent in writing, *New Westminster Brewing Co. v. Hannah*, L. R. 1 Ch. D. 278. The guardian *ad litem* of an infant defendant is competent to give the consent requisite for taking the evidence by affidavit, *Knatchbull v. Fowle*, L. R. 1 Ch. D. 604.

Where a party unreasonably refuses to consent to the evidence being by affidavit, the Court may order him to pay the costs of the other party desiring to have it so taken, *Patterson v. Wooler*, L. R. 2 Ch. D. 586.

*Time for filing*.—Under the old practice no affidavit to be used could be sworn before bill filed, *Francome v. Francome*, 13 W. R. 355; *Fennal v. Brown*, 18 Jur. 1051; unless where the practice required an affidavit to be annexed to the bill at the time of filing, *Walker v. Fletcher*, 12 Sim. 420. But since the Judicature Act an affidavit was allowed entitled in an action not yet begun, and in the matter of the Judicature Act, *Young v. Brassey*, L. R. 1 Ch. D. 277.

The time for filing affidavits and taking evidence may be enlarged in proper cases, see *Anderton v. Yates*, 15 Jur. 833; *Mayes v. Mayes*, 11 Jur. N. S. 1033. Thus, where affidavits were filed just before the close of the time, containing charges as to which no issue had been raised in the pleadings, counter affidavits were allowed, *Scott v. Mayor of Liverpool*, 1 D. & J. 369; and see *Hope v. Threfall*, 1 Sm. & G. app. 21; *Douglass v. Archbutt*, 23 Beav. 293.

*Form of affidavit*.—The style of cause in an affidavit may be "Between A. B. and others, plaintiffs, and C. D. and others, defendants," G. O. Chy. No. 597. If the full style of cause is professed to be given, it must be given correctly, *May v. Prinsep*, 11 Jur. 1032; *Mackenzie v. Mackenzie*, 5 D. & Sm. 338; *Solomon v. Stalman*, 4 Beav. 243; but see *Hawes v. Bamford*, 9 Sim. 653; *re Varteg Iron Works Chapel*, 10 Ha. app. 37. Affidavits erroneously entitled allowed to be taken off the file and re-sworn, *Fisher v. Coffey*, 1 Jur. N. S. 956; and see *re Barnes*, 5 L. T. N. S. 787.

The signature of the deponent cannot be dispensed with, *Anderson v. Stather*, 9 Jur. 1085; nor the words "make oath," *Phillips v. Prentice*, 2 Ha. 542; *re Newton*, 2 D. F. & J. 3; *Allen v. Taylor*, L. R. 10 Eq. 52; see also O. XXXII., r. 3.

"*Within 14 days*."—As to computation of time, see O. LII.

"*Judge in Chambers*."—See notes to O. IV., r. 1 (a).

### 302.

2. The defendant within 14 days after delivery of such list, or within such time as the parties may agree upon, or a Judge in Chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

See Eng. R. Sup. C., O. XXXVIII., r. 2; G. O. Chy. Nos. 268, 269.

"*Within 14 days*."—As to computation of time, see O. LII.

### 303.

3. Within 7 days after the expiration of the said 14 days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matter strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

See Eng. R. Sup. C., O. XXXVIII., r. 3.

"*Within 7 days*."—As to computation of time, see O. LII.

Under the corresponding English rule, it has been held notwithstanding the wording of the rule, that the plaintiff's affidavit in reply need not be restricted to cutting down the defendant's evidence, but may be confirmatory of the plaintiff's evidence in chief, *Peacock v. Harper*, L. R. 7 Ch. D. 648. **O. XXXIV. R. 3.**

*Witnesses to rebut defendant's evidence.*—In an action to set aside a deed of dissolution of partnership, and to have specific performance of an alleged agreement for dissolution upon different terms, witnesses were examined on behalf of the plaintiff. The plaintiff himself deposed to a certain conversation which took place between him and the defendant, at the plaintiff's house, on the 19th August, 1878. This conversation formed the principal ground for the charges made by the claim as to the actual agreement for dissolution of the partnership. The plaintiff's wife also gave evidence as to the conversation which took place in her presence at the plaintiff's house on the 19th August. This witness was cross-examined as to the effect of that conversation. Witnesses were then examined on behalf of the defendant. The defendant himself denied that he had been at the plaintiff's house on the 19th August, 1878, and denied that any conversation to the effect alleged by the plaintiff had ever taken place. After the defendant's witnesses had all been examined, the plaintiff asked to be allowed to call further witnesses to deny the statement of the defendant, as to his not having been at the plaintiff's house, on the ground that they had been taken by surprise, and had been thrown off their guard by the course taken in cross-examination. *Malins, V. C.*, said: "The contradictions in the evidence were palpable, the story told by the plaintiff and his wife being completely contradicted by the defendant. The plaintiff's wife was not cross-examined as to the fact of the defendant having been in the house on the 19th August; on the contrary, the whole tone of the cross-examination was an admission of that fact, and a denial of the effect of the conversation." His Lordship considered that the cases referred to in *Taylor on Evidence*, were in favour of the Court having discretion to admit additional evidence in such a case as this, and considering the extremely difficult position in which he was placed in having to decide upon such contradictory evidence, and it being a turning point in the case, he thought he was at liberty to have the difficulty removed by any further evidence that could be adduced, he would therefore give leave to the plaintiff to call additional witnesses, *Rogers v. Manley*, W. N. (1880), 106.

Where a party is taken by surprise by a point made against him, at the hearing the Judge may, if he think right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal, *Bigsby v. Dickinson*, L. R. 4 Ch. D. 24.

### 304.

1. Where the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

See Eng. R. Sup. C., O. XXXVIII., r. 4.

R. S. O. chap. 62, s. 18, is as follows: Wherever any party in any civil suit or action desires to call the opposite party as a witness, at the hearing or trial he



**O. XXXIV.  
R. 4.**

shall either subpoena such party, or give to him or his attorney at least eight days' notice of the intention to examine him as a witness in the cause, and if such party does not attend on such notice or subpoena, such non-attendance shall be taken as an admission *pro confesso* against him in any such suit or action, unless otherwise ordered by the Court or Judge in which, or before whom, such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be non-suited, or the proceedings in the action in such suit may be postponed by the Court or Judge, on such terms as the Court or Judge sees fit to impose.

"*Before the expiration of 14 days.*"—As to computation of time, see O. LII.

"*His affidavit shall not be used.*"—In *Meyrick v. James*, W. N. (1877) 120, a motion was made on behalf of the defendants to take certain affidavits filed on behalf of the plaintiff off the file, on the ground that the deponent, who had been ordered to attend before the examiners to be cross-examined, had not been produced. The Master of the Rolls held that the motion was irregular, and that it would not be in accordance with the practice of the Court to order the evidence to be taken off the file.

"*Witness fees.*"—In *Richards v. Goddard*, L. R. 10 Ch. App. 288, the plaintiff produced a witness before the examiner, and demanded the expenses of his production. The defendant's solicitor objected to the amount, but undertook to pay what should be found due on taxation. The witness was then sworn and the cross-examination proceeded. The plaintiff then applied for an order for repayment by the defendant of the amount paid by the plaintiff to the witness for his expenses, or for taxation, and payment of the amount found due. V.-C. Hall declined to make any order:—Held, on appeal, that the matter was not one for judicial discretion, but that the plaintiff was entitled, *ex debito justitiæ*, to an immediate order for taxation and payment.

### 305.

5. The party to whom such notice as is mentioned in the last preceding Rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined.

### 306.

6. Where the evidence in any action is under this Order taken by affidavit, the notice of motion for judgment thereon shall be given at the same time or times after the close of the evidence, as in other cases is by these Rules provided after the close of the pleadings.

See Eng. R. Sup. C., O. XXXVIII., r. 5.

"*Notice of motion for judgment.*"—The corresponding words in the English rule are "notice of trial." The object of the change is not apparent. Notice of motion for judgment may be given after evidence has been taken and without any trial being had (O. XXXVI., r. 8.), but these cases are not of that class in respect of which a consent would be required before the evidence could be given by affidavit. The present order evidently relates to evidence for the trial, and the rule under consideration was probably intended to apply to a notice of trial.

## ORDER XXXV.

## MOTION FOR NEW TRIAL IN JURY CASES.

## 307.

1. Where there has been a trial by a jury, any application for a new trial shall be to a Divisional Court. **O. XXXV. R. 1.**

By the Eng. R. Sup. C., Dec. 1876, r. 5, where there has been a trial in one of the Common Law Divisions by a jury, any application for a new trial shall be to a Divisional Court, and where the trial has been by a Judge without a jury the application shall be to the Court of Appeal. The present rule is limited to cases tried by a jury (as originally drawn it made provision for cases tried without a jury, but that part of it was afterwards struck out), but is not confined to Common Law Divisions.

Under the R. S. O. c. 5, s. 287, a motion for a new trial where cases were tried by a Judge were to be made in the same manner as if they were tried by a jury. In Chancery, motions for new trials were of rare occurrence, and could not be founded upon mistakes made by the Judge, but only upon mistakes of the parties or upon the ground of surprise. The remedy in case of an improper ruling of the Judge was by appeal. As the rule includes Chancery cases, and no provision is made for a new trial in cases where there is no jury, it is probable that the Chancery practice, as indicated above, will prevail in such cases, except perhaps where proper evidence has been rejected; and even in such case the evidence can be subsequently admitted without a new trial being had. See notes to sec. 12 of the Act as to cases of conflict between Chancery and Common Law Practice.

In *Mason v. Seney*, 12 Gr. 143, will be found a discussion upon the particulars that are necessary to be shewn in support of a petition to be allowed after the hearing of the cause to put in newly discovered evidence, and see *Anderson v. Titmas*, 36 L. T. N. S. 711. A case of *Dow v. Dickinson* is noted in the W. N. (1881) 52, where it is said that affidavits in support of a new trial upon the ground of surprise ought clearly to state what the grounds of surprise are.

During the trial of an action before a jury, the Judge was asked by the defendant's counsel to non-suit the plaintiffs, and to direct a finding for the defendants, upon the ground that no evidence had been given in support of the plaintiff's case. This the Judge refused to do, and the jury found the issue left to them in favour of the plaintiffs. Upon the following day the Judge directed judgment to be entered for the plaintiffs, and stated his reasons for holding that there was evidence to support the finding of the jury. The defendants appealed to the Court of Appeal:—Held, under the English rule above quoted, that the appeal would not lie, for the judgment was upon the face of it correct, so long as the finding stood unreversed, and that the Court of Appeal had no power in the first instance to review the finding of a jury, *Davies v. Felix*, L. R. 4 Ex. D. 32; and see *Yetts v. Foster*, L. R. 3 C. P. D. 437.

"A Divisional Court."—By sec. 25, sub-a. 2 of the Act, all interlocutory and other steps and proceedings in or before the High Court in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the High Court to which such a matter is for the time being attached.

## 308.

2. The application for a new trial shall be by motion calling on the opposite party to shew cause at the expiration of 8 days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed.

See Eng. R. Sup. C., March, 1879, r. 6.

**O. XXXV.  
R. 2.**

"*By motion.*"—This probably means a rule *nisi*, for the rule speaks of "8 days from the date of the order." Rule 4, too, directs service of the order, and rule 8 refers to the argument on an order to shew cause; see also O. XLVII., rr. 1, 2.

"*At the expiration of 8 days.*"—As to computation of time, see O. LII.

### 309.

3. The application shall be made within the first 4 days of the sittings of the Divisional Court, for hearing such applications which may take place next after the trial;

See Eng. R. Sup. C., March, 1879, r. 6; R. S. O., c. 50, s. 284.

"*Within the first 4 days.*"—As to computation of time, see O. LII. As to the power of the Court to extend the time, see O. LII., r. 9., which will probably set at rest the controversy raised in *Rooney v. Rooney*, 4 App. R. 255.

(a) In case the decision of a question raised at the trial is reserved, and is not given until the sittings aforesaid by the Judge reserving the same, all motions respecting the trial shall be made within 10 days after the day on which the decision is given, if so many days expire in such sittings, and if not, then within the first 4 days of the ensuing sittings; and until the time for moving as aforesaid has expired, judgment shall not be signed unless the Judge who tried the action certifies in the manner hereinafter provided;

This is almost a copy of R. S. O., c. 50, s. 285.

"*Within 10 days.*"—As to computation of time, see O. LII.

"*Certifies in the manner hereinafter provided.*"—This refers to the next sub-rule of this order. It is presumed that this rule does not apply where, under O. XXXIV., r. 2, the Judge has, at the trial, directed judgment to be entered, see O. XXXVI., r. 2.

(b) In case of a trial during the sittings of a divisional court, all motions respecting the same shall be made within 6 days after the day on which the verdict is rendered, if so many days expire in such sittings, and if not, then within the first 4 days of the ensuing sittings; and until the time for moving as aforesaid has expired, judgment shall not be signed unless the Judge who tried the action certifies under his hand, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification.

This is almost a copy of R. S. O., c. 50, s. 286.

See notes to preceding sub-rule.

### 310.

4. A copy of the order shall be served on the opposite party within 4 days from the time of the same being made.

See Eng. R. Sup. C., O. XXXIX., r. 2.

"*Within 4 days.*"—As to computation of time, see O. LII.

## 311.

5. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

O. XXXV.  
R. 5.

See Eng. R. Sup. C., O. XXXIX., r. 3; R. S. O., c. 50, s. 289.

## 312.

6. A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

See Eng. R. Sup. C., O. XXXIX., r. 4; R. S. O., c. 50, s. 289.

*Quere.*—Whether the Courts have not now power to order a new trial as to one defendant without disturbing the verdict as to another, where the merits of the case justify such a course; *per* Mellish, L. J., in *Purnell v. Great Western Railway Co.*, L. R. 1 Q. B. D. 683.

## 313.

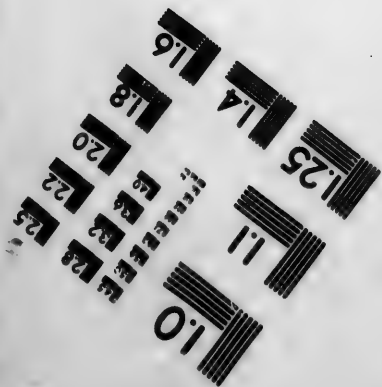
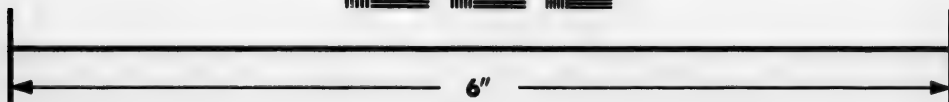
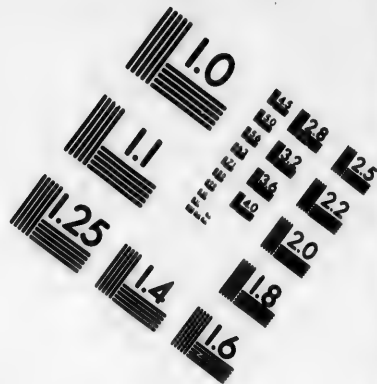
7. An order to shew cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

See Eng. R. Sup. C., O. XXXIX., r. 5.

## 314.

8. On the argument of an order to shew cause, the counsel of the party supporting the application shall begin, and shall state fully the grounds of the application, and shall have the reply.

This is a new provision, and changes the established order of procedure. Counsel moving for the new trial generally has, before obtaining the rule *nisi*, to state fully the grounds of the application, in order to persuade the Court to grant the rule. This rule requires him to repeat, perhaps however more elaborately, his former argument.



# Photographic Sciences Corporation

**23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4503**

1.8  
2.0  
2.2  
2.5  
2.8  
3.2  
3.6  
4.0  
4.5  
5.0  
5.6  
6.3  
7.1  
8.0  
9.0  
10.0  
11.2  
12.5  
14.0  
16.0  
18.0  
20.0  
22.5  
25.0  
28.0  
31.5  
36.0  
40.0  
45.0  
50.0  
56.0  
63.0  
71.0  
80.0  
90.0  
100.0

10  
01  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99



## ORDER XXXVI.

## MOTION FOR JUDGMENT.

## 315.

O. XXXVI.

R. 1.

1. Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

See Eng. R. Sup. C., O. XL., r. 1.

"*Except.*"—The Judge before whom the trial takes place has power to direct judgment to be entered, O. XXXI., r. 21; see also, as to judgments by default of appearance, O. IX.; in default of pleading, O. XXV.; under special order where writ specially endorsed, O. X.; and for disobeying an order for discovery, O. XXVII., r. 18.

For form of judgment on motion, see Forms, No. 160.

## 316.

2. Where at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

See Eng. R. Sup. C., Dec., 1876, r. 7, 1st part.

"*Without any leave reserved.*"—It is to be hoped that the permission in this case, to move without leave reserved, will not by inference be taken to limit R. S. O., c. 50, s. 283, which provides that every verdict shall be considered by the Court, in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose.

## 317.

3. Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong;

See Eng. R. Sup. C., Dec. 1876, r. 7, 2nd part.

"*A Divisional Court.*"—By sec. 25, sub-s. 2 of the Act, all interlocutory and other steps and proceedings in or before the High Court in any cause or matter, subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached.

"*Or to the Court of Appeal.*"—By the English rule the application is to be to the Court of Appeal which is consistent with the rule requiring application for a new

trial to be to that Court where the action has been tried without a jury. By the **O. XXXVI.**  
above rule an alternative is given. **R. 3.**

*Power of Court.*—When judgment has been given in an action tried before a jury who have found specially the facts in dispute, upon a motion in the High Court to set aside the findings, the Court has power to set aside the judgment and enter it for the unsuccessful party at the trial, if they are of opinion that the findings and the judgment at the trial cannot stand, and if they have before them all the materials necessary for finally determining the questions in dispute, *Hamilton v. Johnson*, L. R. 5 Q. B. D. 263.

(a) An application under this Rule may be to a Divisional Court of the High Court or to the Court of Appeal.

### 318.

4. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and there is no direction of a Court or Judge for the entry of judgment, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties, within 10 days after his right so to do has arisen, then after the expiration of such 10 days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties.

See Eng. R. Sup. C., O. XL, r. 7.

"*Issues have been ordered to be tried.*"—See sec. 48 of the Act and notes to sec. 47.

"*Within 10 days.*"—As to computation of time, see O. LII.

For form of judgment on motion after trial of issue, see Forms, No. 167.

### 319.

5. Where issues have been ordered to be tried, or issues or questions of fact to be determined, in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

See Eng. R. Sup. C., O. XL., r. 8.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*Leave to set down.*"—Such leave is not given, unless it is certain what issues are necessary to the decision of the action, *Republic of Bolivia v. National Bolivian Navigation Co.*, 24 W. R. 361.

## 320.

O. XXXVI.  
R. 6.

6. No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

See Eng. R. Sup. C., O. XL., r. 9.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

## 321.

7. Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly; or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

See Eng. R. Sup. C., O. XL., r. 10.

Under R. S. O., c. 50, s. 287, sub-s. 2, the Court in Term had power to enter a verdict only in cases where the trial had been by a Judge without a jury. No such limit is made by the present rule.

*Cases.*—When judgment has been given in an action tried before a jury, who have found specially the facts in dispute, upon a motion in the High Court to set aside the findings, the Court has power to set aside the judgment and enter it for the unsuccessful party at the trial, if they are of opinion that the findings and the judgment at the trial cannot stand, and if they have before them all the materials necessary for finally determining the questions in dispute, *Hamilton & Co. v. Johnson & Co.*, 5 Q. B. D. 263.

A defendant in an action which had been tried by a Judge without a jury, gave notice of appeal against the judgment, and also obtained *ex parte* a rule nisi for a new trial. He did not set down the appeal for hearing, but before the argument of the rule for a new trial, gave fresh notice of appeal from the judgment. There was a substantial question to be tried as to the measure of damages. The appellant being in insolvent circumstances, the plaintiff moved for security for costs:—Held, first, that the plaintiff was entitled to the costs of the first notice of appeal as an abandoned motion; and, second, that the second notice of appeal was unnecessary, inasmuch as the whole question could be tried under this rule upon the application to make the rule for a new trial absolute, and the appellant was, therefore, ordered to give security for costs, *Waddell v. Blockey*, L. R. 10 Ch. D. 416.

In an action for libel defendant was found guilty. He moved under above rule to enter a judgment for the defence, on the ground that there was no evidence upon which the jury could find that the words complained of were not a "fair" report of a trial and therefore privileged. The C. P. Div. made an order for a new trial and refused to enter a judgment for the defence. The defendant appealed, but was unsuccessful, the Court holding that whether the report was fair or not, was a question for the jury, which the Court could not withdraw from them, and that the above rule made no difference as to this, *Millisich v. Lloyds*, W. N. (1877) 36.

"Direct such issues or questions to be tried."—As to mode of trial of issues, see sec. 48 of the Act and notes to sec. 47.

## 322.

8. Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, or in the examination of any other party, be entitled to; and it shall not be necessary to wait for the determination of any other question between the parties; or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned and evidence is necessary so far only as they are concerned, for the purpose of proving facts which are not disputed. The foregoing Rules of this Order shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

O. XXXVI.  
R. 8.

The first and last parts of this rule are taken from the Eng. R. Sup. C., O. XL., r. 11, and the middle from G. O. Chy. No. 270. In Chancery hearings of causes might be either (1) upon examination of witnesses and hearing, which was equivalent to a trial with an argument in term superadded; (2) upon bill and answer, which was a hearing upon the pleadings only, and was adopted when the answer sufficiently admitted the plaintiff's case but did not sufficiently avoid it; and (3) by way of motion for decree, which took place when (a) the only evidence consisted of documents and such affidavits as were necessary to prove their execution or identity, or (b) when infants were concerned and evidence was necessary only for the purpose of proving, for the satisfaction of the Court, facts which were not disputed by the guardian of the infant.

"Or in the examination of any other party."—It has hitherto been the practice in Common Law, where the examination of the defendant contained a sufficient admission of the plaintiff's claim, to move in Chambers to strike out the defence as embarrassing, and for leave to sign judgment in default of plea, see *McMaster v. Beattie*, 6 Pr. R. 162; *Turner v. Neill*, 6 Pr. R. 495; *Davis v. Code*, 7 Pr. R. 2; *Johnson v. Johnson*, 7 Pr. R. 288; *Imperial Bank v. Summerfelt*, 7 Pr. R. 320; *Post v. Leys*, 7 Pr. R. 357; *The Queen Insurance Co. v. Boyd*, 7 Pr. R. 379. A defence in ejectment will not however be struck out on an admission that the defendant has no title, for he is entitled to possession until the plaintiff can prove his case, *Metropolitan Building and Savings Society v. Rodden*, 6 Pr. R. 294.

In Chancery the procedure in such a case would be to set the cause down for hearing upon bill and answer, when the depositions could be read as part of the answer, *Powell v. Lee*, 20 Gr. 621. The above rule follows the Chancery practice in this respect.

A Judge has a discretion as to whether a case is a proper one for making an order on motion, and the Court of Appeal ought not to interfere with the exercise of that discretion, *Mellor v. Sidebottom*, L. R. 5 Ch. D. 342.

A plaintiff moving for judgment under this rule, on admissions in the defendant's pleadings, must have a clear case, and the mere admission or non-denial by the defendant of a right asserted by the plaintiff, but which has in fact no existence in law, is not sufficient to entitle the plaintiff to a judgment establishing the right, *Chilton v. Corporation of London*, L. R. 7 Ch. D. 735. Upon admissions in a statement of defence in an administration action, and upon a notice of motion for "a decree or decretal order," an order can be made upon an ordinary motion, without setting down the motion, *re Barker's Estate*; *Hetherington v. Longrigg*,

**O. XXXVI**  
**H. S.**

L. R. 10 Ch. D. 162. In a partition action in which the defendants, by their statement of defence, admitted the facts stated in the plaintiffs' statement of claim shewing the title of the plaintiffs:—Held, that the plaintiffs were, under this rule, entitled to an order on motion directing the usual inquiries as to the persons interested in the property, *Gilbert v. Smith*, L. R. 2 Ch. D. 686. In an action to take the accounts of a partnership, the defendants by their answer, filed before the Judicature Act came into force, admitted the partnership and that they had not accounted, and alleged that the plaintiff had not accounted, and that moneys were due from him to them. The plaintiff joined issue and moved under the new practice before the hearing, upon affidavit of service, that the accounts of the partnership dealings might be taken:—Held, that he was entitled to the order under that order or under this rule, and an order was made accordingly, *Turquand v. Wilson*, L. R. 1 Ch. D. 85. An order was made, on motion by the plaintiffs on notice, for an account and delivery of securities relating to the testator's estate, of which they were trustees admitted by the defendant in his answer to be in his possession as agent for the plaintiffs, *Rumsey v. Reade*, L. R. 1 Ch. D. 643.

A statement of defence was delivered in an action against a husband and wife on a joint and several promissory note given by them, which, purporting to be the defence of both defendants, raised no defence as regarded the husband:—Held, upon motion for judgment, that the plaintiff was entitled under this rule to final judgment against the husband without waiting for the determination of the case against the wife, *Jenkins v. Davies*, L. R. 1 Ch. D. 696. In Ontario, however, the silence of a pleading is not to be taken as an admission of the facts contained in the previous pleading, *O. XV., r. 24*.

A defendant delivered a statement of defence which, if uncontradicted, was a good defence to the plaintiff's claim; and the plaintiff's did not reply or obtain further time within the time limited, the defendant then before the expiration of the six weeks within which a plaintiff must under Order XXXI., r. 2, give notice of trial, moved under this Rule that the action might be dismissed with costs, on the ground that by not replying the plaintiff had admitted the defence:—Held, that the defendant seeking to dismiss an action under such circumstances was not "a party applying for relief" within the meaning of this rule, *Litton v. Litton*, L. R. 3 Ch. D. 793.

Where one of several defendants served has not appeared, while the others have appeared and delivered defences, the plaintiffs have moved for judgment against other defendants who have delivered defences, under this rule, upon admissions, and as against the defaulting defendant under Ord. XXV., r. 10, but as against the latter the action must be set down on motion for judgment, and in both cases two clear days' notice of motion must be given, *Parsons v. Harris*, L. R. 6 Ch. D. 694.

As to the form of order on motion for judgment under this rule, when the further hearing of the action is adjourned, see *Bennett v. Moore*, L. R. 1 Ch. D. 692.

"As soon as the right of the party applying to the relief claimed has appeared upon the pleadings."—The words "or in the examination, etc.," should have been added. If these words are taken literally the motion cannot be made unless the admissions are made in the pleadings. As the examination of parties in Chancery, however, was considered a part of the pleadings, that word may perhaps be held to include the examination, more especially as the first part of the rule shews clearly the intention to permit the motion to be made upon admissions in the depositions, see *Powell v. Lea*, 20 Gr.

### 323.

9. Where it is made to appear to the Court or a Judge, on the hearing of any application which may be pending before the Court or Judge, that it will be conducive to the ends of justice to permit it, the Court or Judge may direct the application to be turned into a motion for judgment, or a hearing of the cause or matter; and thereupon the Court or Judge may make such order as to the time and manner of giving the evidence

in the cause or matter, and with respect to the further prosecution thereof, as the circumstances of the case may require; and upon the hearing it shall be discretionary with the Court or Judge to either pronounce a judgment or make such order as the Court or Judge deems expedient. **O. XXXVI. R. 9.**

See G. O. Chy. No. 614.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

### 324.

10. Where at any time after the writ of summons has been issued it is made to appear to the Court or a Judge on an *ex parte* application that it will be conducive to the ends of justice to permit a notice of motion for a judgment to be forthwith served, the Court or Judge may order the same accordingly; and when such permission is granted, the Court or Judge is to give directions, as to the service of the notice of motion and filing of the affidavits, as may be expedient.

(a) Upon the hearing of such motion the Court may grant or refuse the application or instead of either granting or refusing the same, may give such directions for the examination of either parties or witnesses, or for the making of further inquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as the Court thinks right.

See G. O. Chy. Nos. 271, 272.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

### ORDER XXXVII.

#### ENTRY OF JUDGMENT.

### 325.

1. Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The forms in Appendix (I) hereto may be used for entering judgments, with such variations as circumstances may require. **O. XXXVII. R. 1.**

See Eng. R. Sup. C., O. XLI., r. 1; R. S. O., c. 50, s. 302.

"Judgment."—Judgment includes decree, sec. 91.

"Entered."—At Common Law the form of judgment, after reciting the default of the defendant, or the terms of an order, or *he postea*, etc., proceeded, "It is adjudged that, etc." The entry of the judgment was the signing by the Clerk of the Court



**Q XXXVII.** of the note in the margin of the judgment roll, which remained of record in the Court. In Chancery each paragraph of a decree commenced, "This Court doth declare," or "This Court doth order and decree." The *entry* consisted in the decree, after it was settled and signed, being entered or copied into a book, until which it was not complete, *Drummond v. Anderson*, 2 Gr. 150. The decree was then delivered out to the solicitor.

Under the Judicature Act both forms will be adopted. All the forms given of judgments by default (Forms, Nos. 147, 148, 149, 150, 151, 152, 164, 165, 166,) use the words "It is adjudged," with the exception of the forms of judgments of foreclosure or sale (168, 169), redemption (170), administration (171), and partition or sale (172), in which the Chancery form is followed. The forms of judgment after trial (154, 156, 157, 158, 159, 163), after an order in Chambers (153, 161, 162), and after motion for judgment (160, 167), use the Common Law expression; while the form of judgment at trial by a Judge (156) has the words "This Court doth declare," "This Court doth order and adjudge."

As to the mode of entering judgments, see Seton, (4th ed.) 12, 13, 32, 1546.

*Settling judgments.*—By O. XLIX., r. 2, "two of the officers of the High Court shall, in addition to their other duties, be judgment clerks of the High Court, for the purpose of settling the form and terms of such special judgments, as may be referred to them for that purpose by any Divisional Court, or a Judge of any Division, or by the Master in Chambers."

It has been the practice in Chancery to settle all decrees except those of the simplest form before a Registrar. For this purpose the party having the conduct of the cause prepares and leaves with one of the Registrars draft or minutes of the decree, and obtains an appointment which is served upon the other parties. Upon its return the minutes are gone over and settled. The Registrar may introduce such alterations as from his experience he believes the Court would sanction, *Davenport v. Stafford*, 8 Beav. 503; *Hargrave v. Hargrave*, 3 Mac. & G. 348. In cases of much complication another appointment is taken, after the decree has been engrossed to pass the decree, upon which the engrossment is compared with the minutes and signed by the Registrar. G. O. Chy. No. 12 provides that no notice to settle minutes or pass an order is to be given unless by direction of the Registrar; and G. O. Chy. No. 13, that where a notice is given to settle minutes, or to pass an order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the Registrar may proceed *ex parte* to settle the minutes or pass the order, or may in his discretion order the party giving the notice to pay to the other the costs of his attendance; or if a party served asks for delay the Registrar may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise.

"*Speaking to the minutes.*"—If any party is dissatisfied with the form of the decree, as settled by the Registrar, he should obtain from the Registrar a stay of the decree and serve notice of motion to vary the minutes, shewing in the notice the alterations desired.

At the hearing a decree was pronounced in favour of the plaintiff with costs generally, but, on moving to vary the minutes, statements and admissions in the answer were pointed out, to which the attention of the Court had not been drawn at the hearing, which would have enabled the plaintiff to have obtained the same decree on bill and answer. The Court varied the decree by directing that only such costs should be taxed as would have been incurred by a hearing on bill and answer, *Johnson v. Trustees of Public School Section No. 1, in the Township of Howard*, 26 Gr. 204.

In *Machar v. Vandewater*, 26 Gr. 319, the defendant, at the hearing, was found answerable to the plaintiff in respect of shares of stock bought by the plaintiff through his agency, and subsequently the Court, on motion, added to the decree a direction that the defendant should indemnify the plaintiff against future calls on such stock, but refused costs of the application to either parties; to the plaintiff because the relief would have been granted at the hearing if then asked; and to the defendant because he resisted that to which the plaintiff was clearly entitled.

See also as to variation of decree without rehearing, *Pepper v. Pepper*, W. N. (1889) 104; *re Robinson*, W. N. (1873) 281; *Andrews v. Bohannon*, W. N. (1869) 80; *Tiel v. Barlow*, 3 D. J. & S. 426; *Viney v. Chaplin*, 3 D. & J. 282.

*Variation of præcipe decrees.*—Where a party to a cause is dissatisfied with the manner in which the Registrar takes the account between the parties, and desires

to have the decree drawn up by the officer on *præcipe* varied, it is not necessary to rehear the causes; the proper mode is to present a petition to the Court for that purpose, *Nelles v. Vandyke*, 17 Gr. 14. **O. XXXVII. R. 1.**

*Correction of decree after entry.*—Where a decree is settled and issued in the absence of one of the parties, without providing for relief to which he is entitled, and which would have been given him if brought to the attention of the Court; the proper mode of having the error corrected is to move upon petition; it is not necessary to rehear for that purpose, *Simmers v. Erb*, 21 Gr. 289.

As to clerical errors in decree, see **O. XXVII., r. 14.**

*Wrong decree will not be acted upon.*—In *Thompson v. Dodd*, 26 Gr. 381, a decree was pronounced at the hearing declaring a deed void to the extent of the interest reserved in favour of the grantor and his wife and the children of a daughter of the grantor, but in drawing up the decree the deed was declared void as to the children of an intended marriage of a son of the grantor. Under this decree a sale of the trust estate was had at the instance of the plaintiff, a creditor who had filed the bill impeaching the deed as fraudulent. The Court, under these circumstances, refused to carry out the sale, and ordered the decree to be corrected, and a new sale had, in which the interests of the children of the marriage should be protected.

### 326.

2. Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date.

See Eng. R. Sup. C., **O. XLI., r. 2.**

Under the former practice it was held that an order of the Court of Chancery is made on the day when it is pronounced by the Judge and not on the day when it is drawn up, *Re Risca Coal Co.*, 10 W. R. 701.

### 327.

3. In all cases not within the last preceding Rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

See Eng. R. Sup. C., **O. XLI., r. 3.**

All judgments whether interlocutory or final, shall be entered on record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*, Rules of Prac., Trin. Term 1856, No. 47.

### 328.

4. Where under the Act or these Rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required, he shall enter judgment accordingly.

See Eng. R. Sup. C., **O. XLI., r. 4.**

MORRIS UNIVERSITY LAW LIBRARY

## 329.

O. XXXVII.  
R. 5.

5. Where by the Act or these Rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate, sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

See Eng. R. Sup. C., O. XLI., r. 5.

The indorsement of a certificate by the officer present at the trial, upon the copy of the pleadings delivered for the use of the Judge at the trial of a direction to enter judgment, shall be sufficient authority to the proper officer for entering judgments, to enter judgments accordingly, O. XXXI., r. 22.

## 330.

6. Any judgment of nonsuit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, accident, or otherwise, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.

See Eng. R. Sup. C., O. XLI., r. 6; G. O. Chy. No. 184.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Surprise."—See notes to O. XXXV., r. 1.

## 331.

7. Where a sale is ordered, the master may cause the property, or a competent part thereof, to be sold either by public auction private contract, or tender, or part by one mode and part by another, as he may think best for the interest of all parties, and he may fix an upset price or reserved bidding, but such price or bidding must be so fixed at the meeting held by him for the purpose of settling the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale. The master is to settle all necessary conveyances for the purpose of carrying out the sale in case the parties differ, or in case there shall be any persons under any disability (other than coverture) interested in such sale.

See notes under Mortgage Suits, Part III.

## 332.

8. Upon a reference under a judgment for redemption, the master is, without any special direction, to take an account of what is due to the defendant for principal money and interest, and is to tax to him his costs, and also appoint a time and place

or times and places for payment according to the present **O. XXXVII.**  
practice of the court in that behalf. **R. 2.**

See notes under Mortgage Suits, Part III.

### 333.

9. In a redemption suit, in default of payment being made according to the report, the defendant is to be entitled on an *ex parte* application in Chambers to a final order of foreclosure against the plaintiff, or to an order dismissing the bill with costs to be paid, by the plaintiff to the defendant, forthwith after taxation thereof.

See notes under Mortgage Suits, Part III.

### 334.

10. In a redemption suit where the plaintiff is declared foreclosed, directions may be given either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves, and such order shall have the same force and effect as a judgment obtained at the suit of the original defendant.

See notes under Mortgage Suits, Part III.

### 335.

11. Where the order is for redemption or foreclosure, be redemption or sale, such proceedings are in such case to or thereupon had, and with the same effect as in a suit for foreclosure or sale, and in such case the last incumbrancer is to be treated as the owner of the equity of redemption.

See notes under Mortgage Suits, Part III.

### 336.

12. In a suit for foreclosure or sale upon payment by the defendant, or in a suit for redemption upon payment by the plaintiff, or payment of the amount found due, the plaintiff or defendant shall, unless the decree otherwise directs, assign and convey the mortgaged premises in question to the defendant, (or plaintiff, as the case may be,) making the payment, or to whom he may appoint, free and clear of all incumbrances done by

- O. XXXVII.** him, and deliver up all deeds and writings in his custody or  
**R. 12.** power relating thereto, upon oath, and in case of a corporation the affidavit shall be made by the officer thereof having the custody of such deeds and writings.

See notes under Mortgage Suits, Part III.

### 337.

13. The foregoing rules, 7-12, are to apply to all cases of reference to the master in suits for foreclosure, sale or redemption.

See notes under Mortgage Suits, Part III.

### 338.

14. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion without an appeal.

See Eng. R. Sup. C., Dec. 1879, r. 5.

An application to amend an order which has not been drawn up in conformity with the judgment pronounced, so as to make the same conformable thereto; and an application to correct any other clerical mistake in an order, or an error arising from an accidental slip or omission, may be made in Chambers on petition, and the Court may grant the same, if under all the circumstances the Court sees fit, G. O. Chy. No. 335. Where an order, as drawn up, requires amendment in any other particular on which the Court did not adjudicate, the same may be amended in open Court on petition without a rehearing, if under all the circumstances the Court deems fit, G. O. Chy. No. 336. Where a necessary direction is omitted in a decree, the Court will amend it, though passed and entered, *Moffatt v. Hyde*, 6 U. C. L. J. 94; and see *Eadie v. McEwen*, 14 Gr. 404. An application to correct a clerical error in a decree or order, must as a general rule be made upon notice, *Radenhurst v. Reynolds*, 11 Gr. 521.

See also notes to O. XXXVII., r. 1.

## ORDER XXXVIII.

### EXECUTION.

### 339.

- O. XXXVIII.** 1. A judgment for the recovery by or payment to any person  
**R. 1.** of money may be enforced by any of the modes by which a judgment or decree, for the payment of money, of any of the Superior Courts, might have been enforced at the time of the passing of the said Act.

See Eng. R. Sup. C., O. XLII., r. 1; R. S. O., c. 66, ss. 14, 72 & 73.

*Time for issue of writs of *fi. fa.**—There is a discrepancy between the practice at Law and in Chancery as to the regularity of writs issued immediately after signing of judgment or issue of an order. In *Coolidge v. Bank of Montreal*, 6 P. R. 73, it

was held that a party who has to pay debt and costs on a final judgment on verdict non-suit, demurrer, or otherwise, in the ordinary course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them, nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "reasonable time" for payment. But in *Cullen v. Cullen*, 2 Ch. Ch. R. 94, it was held irregular to take out a *fi. fa.* the instant costs have been taxed, without allowing a reasonable time to the solicitor, whose client has to pay them, to communicate the result of the taxation. This question seems to be now settled by rule 14 of this Order.

So long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within the meaning of sec. 24, sub-sec. 7, of the Judicature Act, 1873 (Ont. Act, sec. 16, sub-sec. 8), and consequently in an action by a creditor against a debtor, in which the plaintiff has obtained final judgment, the Court has power, under that sub-section, in order to satisfy the judgment, to grant equitable execution against the defendant by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such case to bring another action for the purpose, *Salt v. Cooper*, L. R. 16 Ch. D. 544.

A sheriff's officer and an auctioneer proceeded with the sale of the property of a trader, seized under a *fi. fa.*, after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order restraining further proceedings under the writ:—Held, that the sheriff's officer and the auctioneer had been guilty of contempt of Court, and that they must pay the costs of a motion to commit them, *In re Bryant*, L. R. 4 Ch. D. 98; see also *ex parte Langley*, L. R. 13 Ch. D. 110.

For forms of writ of *fi. fa.*, see Forms, No. 175.

For form of order for costs, see Forms, No. 176.

For form of writ of *venditioni exponas*, see Forms, No. 177.

For form of writ for delivery or assessed value of chattels, see Forms, No. 183.

For form of writ of *feri facias* to recover a defendant's costs where a plaintiff has given notice of discontinuance of the action under Order XIX., and has made default in payment of the defendant's costs of suit, *Bolton v. Bolton*, L. R. 3 Ch. D. 276.

*Sequestration*.—If a party who is ordered to pay money neglects to obey the order according to the exigency thereof, the party prosecuting the order may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue, G. O. Chy. No. 291.

To entitle a party to a writ of sequestration it is not necessary now to shew that the order for payment and a demand thereunder have been personally served on the party ordered to pay, *Long v. Long*, 6 Pr. R. 137. Before resorting to a writ of sequestration under Ord. 291, a writ of *feri facias* goods should be issued; then if that fails, an order attaching debts; and a writ of sequestration should issue only (1) where the lands are insufficient to satisfy the debt and it becomes important to realize the profits during the time that must elapse before they can be sold under a *feri facias*; or (2) where the interest of the debtor is of such a nature that it cannot be taken under a *feri facias*, *Nelson v. Nelson*, 6 Pr. R. 194. The power of the Court to order a sequestration instead of a *feri facias*, if occasion should require, is not interfered with by these rules, 16.

As to claims of third persons upon property seized under a writ of sequestration, see *Prentiss v. Brennan*, 2 Gr. 274, 322, 582. Notice must be given of an application for an order to sell property seized by sequestration, *Forbes v. Connolly*, 1 Ch. Ch. R. 6. Lands cannot be sold under the writ, *Nelson v. Nelson*, 6 Pr. R. 194.

As to the effect of a writ of sequestration upon leases and rent, see *Jackson v. Jackson*, 1 Ch. Ch. R. 115; *Harris v. Meyers*, 2 Ch. Ch. R. 121; 3 Ch. Ch. R. 89, 107; *Meyers v. Meyers*, 19 Gr. 541. As to the effect of a writ of sequestration upon choses in action, see *McDowell v. McDowell*, 1 Ch. Ch. R. 140; *Irving v. Boyd*, 15 Gr. 157.

For forms of writ of sequestration, see Forms, No. 182.



## 340.

O. XXXVIII  
R. 2.

2. A judgment for the payment of money into Court may be enforced by any mode by which a judgment or decree for that purpose of any such Court might have been enforced at the time of passing the said Act.

See R. Sup. C., O. XLII., r. 2.

By R. S. O., c. 66, s. 72, sub-s. 3, in case a decree or order in Chancery directs the payment of money into Court, or to the credit of any cause, or otherwise than to any person, the person having the carriage of the decree or order, so far as relates to such payment, shall be deemed the person to receive payment with in the meaning of the two preceding sub-sections of that section.

## 341.

3. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

See Eng. R. Sup. C., O. XLII., r. 3.

Upon judgment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the plaintiff, R. S. O., c. 51, s. 36. As to order for delivery of possession and writ of assistance in Chancery, see G. O. Chy. Nos. 294, 339. As to the writ of *habere facias possessionem*, see Harrison's C. L. P. A. 536.

For form of writ of possession, see Forms, No. 178.

## 342.

4. A judgment for the recovery of any property other than land or money may be enforced:

By writ for delivery of the property:

By writ of attachment:

By writ of sequestration.

"*Writ for delivery of property.*"—Where an action is brought for the specific recovery of chattels, the plaintiff may, upon default of appearance, have judgment for the delivery of the chattels; and may then enforce that judgment under this rule, *Ivory v. Cruikshank*, W. N. (1875) p. 249.

For form of writ for delivery of property, see Forms, No. 179.

"*Writ of attachment.*"—See next rule.

"*Writ of sequestration.*"—See rule 1 of this Order.

## 343.

5. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

See Eng. R. Sup. C., O. XLII., r. 5.

If a party who is ordered, otherwise than by an order of course, to do any act other than to pay money in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall at the expiration of the time limited, upon filing an affidavit of the service of the order and

of the non-performance thereof be entitled upon *proceipe* to a writ or writs of attachment against the disobedient party, G. O. Chy. No. 288. But the Court will not commit for disobeying an order where the disobedience is in effect the non-payment of money, *Male v. Bouchier*, 1 Ch. Ch. R. 359; 2 Ch. Ch. R. 254; *Harris v. Meyers*, 1 Ch. Ch. R. 229. An attachment to commit for contempt will not be granted merely for non-payment of the costs of the contempt, *Dickson v. Cook*, 1 Ch. Ch. R. 210; *Pherill v. Pherill*, 2 Ch. Ch. R. 444; *Clark v. Clark*, 3 Ch. Ch. R. 67. It is improper to have recourse to an attachment when the object sought can be attained without such process, *Mason v. Seney*, 2 Ch. Ch. R. 220.

In order to punish a person guilty of a contempt, the Court may imprison him for a stated period, allowing him to be discharged if he pay the costs of the contempt before the expiration of such period, *Harris v. Myers*, 1 Ch. Ch. R. 229.

For form of writ of attachment, see Forms, No. 181.

## 344.

6. In these Rules the term "writ of execution" shall include writs of *fieri facias*, *capias*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the expression "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

See Eng. R. Sup. C., O. XLII., r. 6.

## 345.

7. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried.

See Eng. R. Sup. C., O. XLII., r. 7.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

## 346.

8. Where a judgment is against partners in the name of the firm, execution may issue in manner following:

(a) Against any property of the partners as such;

O. XXXVIII  
R. S.

- (b) Against any person who has admitted on the pleadings that he is, or has been adjudged to be a partner ;
- (c) Against any person who has been served, as a partner with the writ of summons, and has failed to appear.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do ; and the Court or Judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

See Eng. R. Sup. C., O. XLII., r. 8.

See all the rules as to partners collected in notes to O. IV., r. 2.

In *J. C. Scripture v. Gordon & S. L. J. Scripture*, 7 P. R. 164, a judgment recovered against the two defendants, who were partners, was paid by the defendant G., who thereupon issued execution against his co-defendant S. on the judgment for half the amount. It appeared that the partnership accounts were unsettled, and that an award had been made in favour of S., the validity of which was disputed by G.:—Held, that under 26 Vic., c. 45, s. 4, the execution was improperly issued, and it was set aside.

### 347.

9. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a *præcipe* for that purpose. The *præcipe* shall contain the title of the action, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued ; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it if he do so in person. The forms in Appendix (E) hereto may be used, with such variations as circumstances may require.

See Eng. R. Sup. C., O. XLII., r. 10, as amended by R. Sup. C., June, 1876, r. 17.

### 348.

10. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same ; and when the solicitor actually suing out the writ shall sue out the same as agent for another solicitor, the name and place of abode of such other solicitor shall also be indorsed upon the writ ; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a

memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or other place, and also the name of the street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

See Eng. R. Sup. C., O. XLII., r. 11; Reg. Gen. T. T., 1856, No. 55, Ont.

### 349.

11. Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (J) hereto may be used, with such variations as circumstances may require.

See Eng. R. Sup. C., O. XLII., r. 12.

See O. II., r. 5.

### 350.

12. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered.

See Eng. R. Sup. C., O. XLII., r. 13; R. S. O., c. 66, s. 44.

As to when a sheriff is entitled to poundage under *fl. fa.* goods, see *Thomas v. Cotton*, 12 Q. B. 148; *Michie v. Reynolds*, 24 Q. B. 303; *Morris v. Boulton*, 2 C. L. Ch. 60; *Giespie v. Shaw*, 10 U. C. L. J. 100; *Grant v. Corporation of the City of Hamilton*, 2 U. C. L. J. N. S. 262; *McRoberts v. Hamilton*, 7 Pr. R. 95; *Consolidated Bank v. Bickford*, 7 Pr. R. 172; when he is not so entitled, see *Walker v. Fairfield*, 8 C. P. 95; *Buchanan v. Frank*, 15 C. P. 196; *Henry v. Commercial Bank*, 17 Q. B. 104; *Winters v. Kingston Permanent Building Society*, 1 Ch. Ch. R. 276; *Brown v. Johnston*, 5 U. C. L. J. 17. As to poundage on *fl. fa.* lands, see *Gates v. Crooks*, 3 O. S. 286; *Leeming v. Hagerman*, 5 O. S. 38; *Morris v. Boulton*, 2 C. L. Ch. 60.

The Court will not interfere on a strict legal ground to reduce the sum indorsed to levy on a *fl. fa.* unless the defendant has an equitable ground to sustain his application, *Maitland v. Secord*, Dra. 456; in a *fl. fa.* and the indorsements thereon the plaintiffs were styled defendants, and *vice versa*, the words being transposed throughout, and the Christian names of the defendants were also transposed:—*Held*, clearly irregular, *Davidson v. Grange*, 5 Pr. R. 258.

In the absence of fraud the Court will only direct the levy to be reduced, *McCormack v. Melton*, 1 A. & E. 331; and where the sum indorsed is too much, has been really levied, the Court may direct the overplus to be refunded, *Barehead v. Hall*, 8 Dowl. P. C. 796. If too little has been levied, the Court may allow plaintiff to amend the indorsements, *Hunt v. Passmore*, 2 Dowl. P. C. 414; *Smith v. Dickinson*, 13 L. J. Q. B. 151.

### 351.

13. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 6 per cent., per annum

**O. XXXVIII** from the time when the judgment was entered up; provided  
**R. 13.** that in cases where there is an agreement between the parties that more than 6 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

See Eng. R. Sup. C., O. XLII., r. 14; Reg. Gen. T. T., 1856, No. 55, Ont.

It was held by Proudfoot, V. C., in *St. John v. Rykert*, 26 Gr. 249, that where the defendant had agreed to pay a rate of interest higher than 6 per cent. until payment of the principal, that the writ might be indorsed for the rate agreed upon. This was, however, reversed in appeal, S. C. 4 App. R. 213.

### 352.

14. Every person to whom any sum of money or any costs shall be payable under a judgment, shall, immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *feri facias* to enforce payment thereof, subject nevertheless as follows:

- (a) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period;
- (b) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the period hereinbefore prescribed.

### 353.

15. A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, be renewed by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ,—either by being marked in the margin with a memorandum signed by the proper officer who issued such writ, or by his successor in office, stating the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and having the like memorandum; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof

See Eng. R. Sup. C., O. XLII., r. 16; R. S. O., c. 66, s. 11.

It shall not be necessary to issue any writ directed to the sheriff of the county in which the venue is laid, but writs of execution may issue at once into any county, and be directed to, and be executed by, the sheriff of any county, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county, R. S. O., c. 66, s. 8.

Any person who becomes entitled to issue a writ of execution against goods and chattels may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the sheriff to whom the writ against goods is directed, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof, R. S. O. c. 66, s. 14.

"Immediately."—See notes to rule 1 of this Order.

This is a re-enactment of R. S. O., c. 66, s. 11, except that the renewal of a writ is now to "by leave of the Court or a Judge."

The R. S. O., c. 66, s. 11, required the writ itself to have marked on the margin a memorandum of the renewal, but by this rule the memorandum may be on a written notice of the renewal.

"Giving a written notice."—For form, see Forms, No. 31.

### 354.

16. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the memorandum in the last preceding Rule mentioned, shewing the same to have been renewed, shall be sufficient *prima facie* evidence of its having been renewed.

See Eng. R. Sup. C., O. XLII., r. 17.

Under this section the production of the writ, or of the notice of the renewal, indorsed with the memorandum, is sufficient *prima facie* evidence of its having been renewed, while R. S. O., c. 66, s. 12, provided that production of the writ marked as renewed "shall be sufficient evidence" of its having been renewed.

### 355.

17. As between the original parties to a judgment, execution may issue at any time within 6 years from the recovery of the judgment.

See Eng. R. Sup. C., O. XLII., r. 18.

This is practically a re-enactment of the provision in the Com. Law Pro. Act, that "During the lives of the parties to a judgment, or of any of them, execution may be issued at any time within six years from the recovery of the judgment, without a revival thereof by *scire facias*, or writ of revivor," R. S. O., c. 60, s. 322.

### 356.

18. Where 6 years have elapsed since the judgment, or where any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge, if satisfied that the party so applying is entitled to issue execution, may make an order to that effect, or may order that any issue or question necessary to determine the rights of

YORK UNIVERSITY LAW LIBRARY



**O. XXXVIII** the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise, as shall seem just.

**R. 18.**

See Eng. R. Sup. C., O. XLII., r. 19.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Any of the ways."—See notes to sec. 47 of the Act.

Execution issued after the time limited without a writ of revivor is voidable, not void, *Goodtitle v. Badtitle*, 9 Dowl. P. C. 1009; *Blanchenay v. Burt*, 4 Q. B. 707; *McNally v. Stephens*, Taylor, 263.

On an application to enforce a judgment more than twenty years old, the applicant was held bound to state circumstances to shew a *prima facie* right on his part, *Loveless v. Richardson*, 4 W. R. 617.

### 357.

19. Every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.

See Eng. R. Sup. C., O. XLII., r. 20; R. S. O., c. 67, s. 12.

A defendant in a suit in Chancery gave judgment in an action at law "to be dealt with as the Court shall direct":—Held, that although liberty to enforce the judgment would not generally be given until the merits of the case were disposed of, the Court was not precluded from allowing execution to issue at an earlier stage of the cause, *Hodges v. Fincham*, L. R. 1 Ch. D. 9.

This rule does not say that the order shall constitute a judgment, but only that it shall be enforceable in the same way. The provisions with respect to attachments of debts and the machinery given by O. XLI., r. 5, apply to judgments only. It was not intended that orders should for all purposes be equivalent to judgments. It was therefore held that an order dismissing a motion with costs, for want of prosecution, is not enforceable by attachment of debt under O. XLI., r. 5, *Cremetti v. Crom*, L. R. 4 Q. B. D. 225; see *Sprunt v. Pugh*, L. R. 1 Ch. D. 567, as to issuing without leave of the Court a writ of sequestration against the estate and effects of a receiver or other person for disobedience of an order of the Court.

*Quære*.—Whether a writ of sequestration can be properly issued to enforce a simple judgment for a debt, or to enforce an order upon a judgment debtor's summons, *Ex parte Nelson*; *In re Hoare*, L. R. 14 Ch. D. 41.

### 358.

20. In cases other than those mentioned in Rule 17, any person, not being a party in an action, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action; and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

See Eng. R. Sup. C., O. XLII., r. 21; G. O. Chy. No. 297.

## 359.

21. No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief, and upon such terms, as may be just.

See Eng R. Sup. C., O. XLII. r. 22.

"*Audita querela*."—By R. S. O. c. 50, s. 132, any matter which, had it arisen before or during the time for pleading, would have been an answer to the action by way of plea, may, if it arises after the lapse of the period during which it would have been pleaded, be set up by way of *audita querela*. *Audita querela* is a remedial writ invented to prevent a defect of justice in cases where a party having a good defence has no opportunity of making it by the ordinary process of law. As to when it lies, see Harrison's C. L. P. A. 177.

## 360.

22. Nothing in any of the Rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

See Eng. R. Sup. C., O. XLII., r. 23.

See Anglo-Italian Bank v. Davies, L. R. 9 Ch. D. 275.

## 361.

23. Nothing in this Order shall affect the order in which writs of execution may be issued.

See Eng. R. Sup. C., O. XLII., r. 24.

R. S. O. c. 66, s. 33, provides as follows:—

Where a writ against the goods of a party has issued from any of the Superior or County Courts, and a warrant of execution against the goods of the same party has issued from a Division Court, the right to the goods seized shall be determined by the priority of the time of the delivery to be executed of the writ to the sheriff, or of the warrant to the bailiff of the Division Court; and the sheriff, on demand, shall by writing, signed by him, or his deputy, or a clerk in his office, inform the bailiff of the precise time of such delivery of the writ, and the bailiff, on demand, shall shew his warrant to any sheriff's officer; and such writing purporting to be so signed, and the indorsement on the warrant shewing the precise time of the delivery of the same to such bailiff, shall respectively be sufficient justification to any bailiff or sheriff acting thereon.

## ORDER XXXIX.

## WRITS OF FIERI FACIAS, &amp;C.

## 362.

O. XXXIX.  
R. 1.

1. Writs of *feri facias* shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

See Eng. R. Sup. C., O. XLIII., r. 1.

Under an execution against goods there may be seized and sold: (1) All goods and chattels, except those exempted under R. S. O., c. 66, s. 2. (2) All shares and dividends of stockholders in any incorporated bank or other company in Ontario having transferable joint stock, R. S. O., c. 66, s. 20. All corporations established for the purpose of trade or profit, or for the construction of any work, or for any purpose from which revenue is intended to be derived, shall be deemed incorporated companies for the purposes of the Act, *Id.* s. 26. (3) The interest or equity of redemption in any goods or chattels, including leasehold interests in any lands, of the party against whom the writ issued, *Id.* s. 27. Any money or bank notes (including any surplus of a former execution against the debtor), and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities, for money belonging to the person against whose effects the writ has issued may be seized. Money or bank notes may be delivered to the execution creditor and the cheques, etc., may be held by the sheriff and the amounts secured sued for in his own name. Under an execution against lands there may be seized and sold: (1) The lands and tenements of the person liable, R. S. O., c. 66, s. 14. As to the estates or interests therein which can be sold, see Harrison's C. L. P. A. 358, note (g). (2) Under a writ against the lands and tenements of any mortgagor of real estate, the sheriff may seize or take in execution all the legal and equitable interest of the mortgagor in the mortgaged lands and tenements, R. S. O., c. 66, s. 35. (3) Any estate, right, title, or interest in lands which under the 5th sec. of the Act respecting the transfer of real property may be conveyed or assigned by any party, or over which such party has any disposing power which he may without the assent of any other person exercise for his own benefit, *Id.* s. 39.

For forms of writs of *feri facias*, see Forms, Nos. 175 & 176.

## 363.

2. Writs of *venditioni exponas* may be issued and executed in the same cases and in the same manner as heretofore.

See Eng. R. Sup. C., O. XLIII., r. 2.

By R. S. O., c. 66, s. 72, it is provided that for the purpose of enforcing payment of any money or any costs, charges, or expenses, payable by any decree or order of the Court of Chancery, or any rule or order of the Courts of Queen's Bench or Common Pleas, or any rule or order of a County Court, the person to receive payment shall be entitled to writs of *fi. fa.* and *venditioni exponas* respectively against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay in the same manner respectively and subject to the same rules, as nearly as may be, as in the case of a judgment at law in a civil action.

For form of writ of *venditioni exponas*, see Forms, No. 177.

## ORDER XL.

## ATTACHMENT OF THE PERSON.

## 364.

1. A writ of attachment against the person shall be issued **O. XL.** under the same circumstances and in the same manner and shall **R. 1.** have the same effect as heretofore according to the practice of the Court of Chancery.

See Eng. R. Sup. C., O. XLIV., r. 1; R. S. O., c. 67, ss. 10, 11; G. O. Chy. Nos. 288-294.

If a party who is ordered, otherwise than by an order of course, to do any act other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing an affidavit of the service of the order, and of the non-performance thereof, be entitled, upon *præcipe*, to a writ or writs of attachment against the disobedient party, G. O. Chy. No. 288.

A warrant to the sheriff to commit a party is not irregular, though no return day is mentioned in it, *Prentiss v. Brennan*, 1 Gr. 497. On a motion to commit for breach of an injunction, it is not necessary for the affidavit to state that the writ was under the seal of the Court, *Farwell v. Wallbridge*, 3 Gr. 628. An attachment to commit for contempt will not be granted merely for non-payment of the costs of the contempt, *Dickson v. Cook*, 1 Ch. Ch. R. 210; but see *Corbett v. Meyers*, 1 Ch. Ch. R. 26; *Harris v. Meyers*, 1 Ch. Ch. 229. It is improper to have recourse to an attachment when the object can be attained without such process, *Mason v. Seeney*, 2 Ch. Ch. R. 220.

A person in contempt cannot take any step in the cause until he has cleared his contempt, but he may move to discharge an order made against him adversely, *Futvoye v. Kennard*, 2 Giff. 110; or shew that subsequent proceedings are irregular, *King v. Bryant*, 3 M. & C. 191; *Morrison v. Morrison*, 4 Ha. 590.

In case the party shall be taken or detained in custody under the writ of attachment without obeying the order, then upon the sheriff's return that the party has been so taken or detained, the party prosecuting the order shall be entitled upon *præcipe* to a commission of sequestration against the estate and effects of the disobedient party, G. O. Chy. No. 289.

If an attachment cannot be executed against the party refusing or neglecting to obey the order by reason of his being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found, and the Court is satisfied by affidavit that such is the case, the party prosecuting the order shall be entitled to an order for a commission of sequestration against the estate and effects of the disobedient party; and it shall not be necessary for that purpose to sue out an attachment, G. O. Chy. No. 290.

Where a defendant, in default for non-compliance with a direction of a Master, was resident out of the jurisdiction of the Court:—Held, that an order for attachment against him could be properly made, *Bloomfield v. Brooke*, 6 P. R. 264.

## 365.

2. No such writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued.

See Eng. R. Sup. C., O. XLIV., r. 2.

**O. XL.****R. 9.**

The costs of an attachment are no longer fixed, but by O. LV., r. 1 (Ont. Act, O. L., r. 1), they are in the discretion of the Court, and should be disposed of at the application for the writ under O. XLIV., r. 2 (Ont. Act, O. XL., r. 2), *Abud v. Riches*, L. R. 2 Ch. D. 528.

An attachment against the sheriff for not returning a writ of *fi. fa.* is not, as formerly, obtained as of course; but since O. XLIV., r. 2 (Ont. Act, O. XL., r. 2), can only be applied for "on notice," *Jupp v. Cooper*, L. R. 5 C. P. D. 26.

Where a notice of motion is given for a writ of attachment to issue against a defendant, under O. XLIV., r. 2 (Ont. Act, O. XL., r. 2), service of such notice on the solicitors on the record of the defendant is sufficient service, *Browning v. Sabin*, L. R. 5 Ch. D. 511; *Richards v. Kitchin*, 36 L. T. N. S. 730; 25 W. R. 602.

A notice of motion in any action or matter for the issue of a writ of attachment under above Order and rule may be served by leaving the same at the place of residence of the party affected thereby, *In re a Solicitor*, L. R. 14 Ch. D. 152. This case was, however, decided upon the ground that O. XLVII., r. 3, did not cover this case, and that the ordinary way prior to the Judicature Act in which a notice of motion was given was by leaving it at the place of residence of the respondent, see notes to O. XLVII., r. 3.

## ORDER XLI.

## ATTACHMENT OF DEBTS.

## 366.

**O. XLI.****R. 1.**

1. Where a judgment is for the recovery by, or payment to, any person, of money, the party entitled to enforce the judgment, may without an order examine the judgment debtor upon oath before a Master, or Local Master, or an Examiner or before one of the Clerks or Deputy Clerks of the Crown, or before the Judge of the County Court of the County within which such debtor resides, or before any official referee, touching his estate and effects, and as to the property and means he had when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred, and as to the property and means he still has of discharging the said judgment, and as to the disposal he has made of any property since contracting such debt or incurring such liability, and as to any and what debts are owing to him.

See Eng. R. Sup. C., O. XLV.; and R. S. O., c. 50, s. 304; c. 49, s. 17.

"Without any order."—An order was necessary under the former practice and is still necessary in England. A form of an order to be made by a Judge in Chambers is, no doubt by oversight, given among the Forms, No. 138.

A plaintiff in an ejectment suit has been held not a judgment creditor within the meaning of the corresponding section of the Common Law Procedure Act, *Challen v. Baker*, 26 L. T. 206; but see *Ekar v. McCall*, 17 Can. L. J. 82; nor is the Queen, *Regina v. Benson*, 2 Pr. R. 350; but a party to an interpleader who has obtained an order for costs is a creditor within the Act, *Hartley v. Shemwell*, 1 B. & S. 1.

A judgment debtor who is an executor is within this clause, *Burton v. Roberts*, 40. XLI. 6 H. & N. 93.

The order for examination may be made though the debtor has been arrested on final process at the suit of the judgment creditor, *Brown v. Benniger*, 2 U. C. L. J. 213.

It is not necessary that the affidavit to obtain an oral examination of the debtor should shew that there are debts due, *Nimmo v. Welland*, 2 U. C. L. J., 213.

The examination of a judgment debtor under Rules of Court, touching the debts due to him is intended to be a cross-examination of the strictest character, and the debtor when under such an examination is bound to answer all questions relevant to the subject matter, and cannot insist on the examination being confined to the simple question "whether any and what debts are due to him," *Republic of Costa Rica v. Strousberg*, L. R. 16 Ch. D. 8.

In case such debtor does not attend as required by the said rule or order, and does not allege a sufficient excuse for not attending, or, if attending, he refuses to disclose his property, or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors, or any of them, such Court or Judge may order such debtor to be committed to the common jail of the county in which he resides, for any term not exceeding twelve months; or such Court or Judge may, by rule or order, direct that a writ of *capias ad satisfaciendum* may be issued against such debtor, and a writ of *capias ad satisfaciendum* may thereupon be issued upon such judgment, or, in case such debtor is at large upon bail, such Court or Judge may make a rule or order for such debtor's being committed to close custody, and the sheriff, on due notice of such rule or order, shall forthwith take such debtor and commit him to close custody until he obtains a rule of Court or a Judge's order for again allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law.

Where a defendant was examined as a judgment debtor and admitted on his examination that he had in his possession a sum of money which he had acquired by betting, and not by converting his property into money, and which he then refused to hand over, an order to commit him on the ground that he had made unsatisfactory answers within the meaning of sec. 305 of the Com. Law Pro. Act was granted, *Merrill v. McFarren*, 1 C. L. T. 133; and see editor's note as to this case, *Id.* 217.

A party applying for the attachment of a judgment debtor for non-compliance with an order for his oral examination, must make an affidavit that conduct money has been tendered to the debtor, and also there must be an affidavit shewing some good reason for not examining the debtor at his place of residence, and also that there were no other means of ascertaining what debts were owing to the debtor, *Protector Endowment Co. v. Whitlam*, 36 L. T. N. S. 467.

*Equitable debt.*—In *Wilson v. Dundas and Stephenson* (Garnishees), W. N. (1875) 232, an application was made by the plaintiff, the judgment creditor, to attach a half year's salary, due to the judgment debtor from his trustees, the defendants. The garnishees contended that this was a trust debt, and therefore not attachable; and, further, that the debt was not due. Quain, J., held that under the new Judicature Act, there was no distinction between a legal and an equitable debt and that there could be an attachment of an equitable debt, and that it was not necessary that the debt should be due, as the words of Order XLV., r. 2 (Ont. Act, O. XLI., r. 1), were "debts owing or accruing." As, however, the garnishee disputed his liability, he ordered a special case to be stated for determining the question under Order XLV., r. 5 (Ont. Act, O. XLI., r. 8).

### 367.

2. In case the judgment is against a body corporate, the person entitled to enforce the judgment may in like manner examine any of the officers of such body corporate, upon oath, before the Judge of the County Court, or other officer, referred to in the next preceding rule, touching the names and resi-



O. XII.  
R. 9.

dences of the stockholders in said body corporate, the amount and particulars of stock held or owned by each stockholder, and the amount paid thereon; also as to any and what debts are owing to the said body corporate; and as to the estate and effects of the body corporate; and as to the disposal made by the body corporate of any property since contracting the debt or liability, in respect of which the said judgment was obtained.

See R. S. O., c. 49, s. 19.

As there is no way of orally examining a corporation but through its directors and officers, it has been held that no examination of a corporation could be had under the corresponding section of the Common Law Procedure Act, as no provision is made for such an examination, *Dickson v. The Neath & Brecon Railway Co.*, 19 L. T. N. S. 702; and see *Cameron v. The Brantford Gas. Co.*, 2 P. R. 58.

See notes to O. XXVII., r. 1.

### 368.

3. Any person liable to be examined under either of the preceding two rules may be compelled to attend and testify, and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness.

See notes to O. XXVII., r. 1.

### • 369.

4. Any person liable to be examined under either of the two preceding Rules, may be served with an appointment signed by the Judge or officer; such service to be made at least 48 hours before the time appointed for the examination; and the person to be examined is to be paid the same fees as a witness.

"48 hours before."—As to computation of time, see O. LII.

(a) In case of such service, the same shall have the same effect as the service of a Rule or Order under the present practice, for the purposes of the 18th and 19th sections of the Administration of Justice Act, and the 305th section of the Common Law Procedure Act.

### 370.

5. The Court or a Judge may, upon the *ex parte* application of the judgment creditor, or the person entitled to enforce the judgment, either before or after the oral examination mentioned in the preceding two rules, and upon affidavit by himself or his

solicitor, or some other person or persons aware of the facts respectively, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within Ontario, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as such Court or Judge shall appoint, to shew cause why he should not pay the judgment creditor, or the person entitled to enforce the judgment, the debt due from such garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

See Eng. R. Sup. C., O. XLV., r. 2; R. S. O., c. 50, s. 307.

An order dismissing an action with costs for want of prosecution is not enforceable by attachment of debts, *Cremetti v. Crom*, L. R. 4 Q. B. D. 225.

The affidavit will not be dispensed with and must be positive and explicit, *Catawaqui Road Co. v. Dunn*, 3 U. C. L. J. 27; but if sufficient grounds be shewn for an affidavit founded on belief, it will be sufficient, *Hazelwood v. DeBergue*, 3 U. C. L. J. 28; and see *McLaren v. Sudworth*, 4 U. C. L. J. 233.

An affidavit of the agent of the attorney is not sufficient, *Tiffany v. Bullen*, 18 C. P. 91; *Boyd v. Haynes*, 5 Pr. R. 15.

A judgment creditor cannot attach a debt due by himself, or by a firm in which he is a partner, *Nonell v. Hullett*, 4 B. & Ald. 646.

The nature of the indebtedness should be fully stated, but where a judge granted an order without this, the Court refused to set it aside, *Tiffany v. Bullen*, 18 C. P. 91. An order to attach will be granted, although the amount be not stated; but it must be stated in a summons to pay over, *Meldrum v. Tulloch*, 3 U. C. L. J. 184; but see *Bank of British North America v. Laughbrey*, 2 U. C. L. J. N. S. 44.

If the garnishee, though residing out of the jurisdiction, have money in the hands of an agent within the jurisdiction, the money may be attached, provided the creditor shews plainly that there is such an agent, in addition to the ordinary contents of the affidavit, *Brown v. Merrills*, 3 U. C. L. J. 31; the case of a foreign corporation is different, *Lundy v. Dickson*, 6 U. C. L. J. 92; *Bank of British North America v. Laughbrey*, 2 U. C. L. J. N. S. 44.

Any debt that a defendant could set off at law against his creditor may be attached, *McNaughton v. Webster*, 6 U. C. L. J. 17; the recovery of a verdict for a debt which might have been attached before any action brought for its recovery, will not make it less a subject of attachment, *McKay v. Tait*, 11 C. P. 72; the surplus money arising from the sale of mortgaged premises in the hands of the mortgagee, may be attached on a judgment against the mortgagor, *McKay v. Mitchell*, 6 U. C. L. J., 61. Money in the hands of a Division Court bailiff may be attached, *Lockart v. Gray*, 2 U. C. L. J. N. S. 163; or in the hands of a sheriff, *In re Smart v. Miller*, 3 Pr. R. 385; and a sum of money directed by a decree or order to be paid is a debt which is attachable, *Cotton v. Vansittart*, 6 P. R. 96.

A garnishee order was made under the rule attaching a debt. At the time the order was made the garnishees had given the judgment creditor a cheque for the amount of the debt. Upon service of the order on the garnishees they stopped payment of the cheque at the Bank, the cheque not having been presented:—Held, that upon the cheque being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached, and the garnishee order was effectual, *Cohen v. Hale*, L. R. 3 Q. B. D. 371.

A debt due to an administrator as such cannot be attached to answer a debt due to him in his private capacity, *Bowman v. Bowman*, 1 Ch. Ch. R. 172; *Mac-*

YORK UNIVERSITY

O. XLI.  
R. 5.

aulay v. Rumball, 19 C. P. 284. Rent to become due at a future time cannot be attached, Commercial Bank v. Jarvis, 5 U. C. L. J. 66; and see McLaren v. Sudworth, 4 U. C. L. J. 233.

As to other cases of debt which cannot be attached, see Campbell v. Perien, 3 U. C. L. J. 68; Smith v. Trust & Loan Co. of Upper Canada, 22 Q. B. 525; Gwynne v. Rees, 2 Pr. R. 282; Bank of Toronto v. Burton, 4 Pr. R. 56; Boyd v. Haynes, 5 Pr. R. 15; Commercial Bank v. Williams, 5 U. C. L. J. 66; Ward v. Vance, 10 U. C. L. J. 269; McCormick v. Park, 9 C. P. 330; Bescoby v. Hamilton Water Commissioners, 9 C. P. 81; Roberts v. The Corporation of the City of Toronto, 16 Gr. 236; Caisse v. Tharp, 5 Pr. R. 565.

A mere notice to treat under the Lands Clauses Consolidation Act, Imp. Act, 8 & 9 Vict., c. 18 (see Dom. Stat. 42 Vict., c. 9, s. 12; R. S. O., c. 165, s. 20), upon which nothing has been done, does not constitute a debt owing or accruing which can be attached under this rule, Richardson v. Elmit, L. R. 2 C. P. D. 9.

Where the order to pay is made for too much, it may be rescinded, and money paid under it recovered back in an action for money had and received, Sessions v. Strachan, 23 U. C. Q. B. 492.

A garnishee order *nisi* does not create a charge until service of it on the garnishee. A judgment creditor of the defendant in a partnership action obtained an order *nisi* to attach all moneys in the hands of the receiver in the action appearing to be due to the defendant. On taking the accounts on the following day, and before service of the order *nisi* the defendant's solicitor obtained, on a summons served on the receiver, a charging order intitled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the defendant under the action. On the next day the garnishee order *nisi* was served on the receiver, and was subsequently made absolute:—Held, that the solicitor was entitled to his costs in priority to the claim of the creditor under the garnishee order, Hamer v. Giles; Giles v. Hamer, L. R. 11 Ch. D. 942. A garnishee order *nisi* does not create a charge until service of it on the garnishee, *Id.*

"Court or a Judge."—See notes to O. IV., r. 1 (a).

For form of affidavit in support of garnishee order, see Forms, No. 36.

For form of garnishee order, see Forms, No. 134.

"Due or accruing due."—Under s. 61 of the Common Law Procedure Act, 1854, an order may be made, not only attaching an accruing debt in the hands of the garnishee, but also an order for payment of the accruing debt when it shall become payable by the garnishee to the judgment creditor. It is not necessary to wait till the debt has become actually payable before making the order for payment, Tapp v. Jones, L. R. 10 Q. B. 591. In that case Blackburn, J., said: "It is evident that the legislature had in view both present debt and future debt, *debita in presenti, solvenda in futuro*, for it speaks in the earlier part of the section of debts owing and accruing. Therefore it is clear that the attachment was good. But in the latter part of the section the language is altered: It speaks merely of 'the debts due.' Now it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read 'the debt due' as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts, as and when they become payable, instead of making a fresh order as each falls due."

In Wilson v. Dundas & Stevenson (Garnishees) W. N. (1875) 232, on an application by the plaintiff, the judgment creditor, to attach half a year's salary due to the judgment debtor from his trustees, the defendants, it was contended for the garnishees that this was a trust debt, and therefore not attachable, and further, that the debt was not due. Quain, J., said:—"O. III., r. 6 (Ont. O. III., r. 6), expressly says that there may be a special indorsement of a trust debt. If Mackenzie (the judgment debtor) bring an action against his trustee he can recover his half-year's salary. It is submitted for the garnishees that there cannot be an attachment of an equitable debt, but there is no distinction now between a legal and an equitable debt. I should be contravening the very object of the Judicature Act if I was to hold otherwise. If we could not now attach an equitable debt sitting here, we might as well be under the *ancien régime*. The debt need not be due, as the words of O. XLV., r. 2 (Ont. O. XLI., r. 5), are 'debts owing or accruing.' In an anonymous case in W. N. (1876) 9, an application having been

made to a Master for a garnishee order and having been refused, on the ground that the affidavit did not state that the debt was due, that refusal was now appealed against. The affidavit stated that the debt was 'owing and accruing.' Quain, J., made the order, but said that the attachment must be confined to that part of the sum which was stated in the affidavit to be accruing at the time of the judgment.

In certain garnishee proceedings in the Division Court of the County of Wentworth, several creditors had obtained orders attaching the whole amount, \$582, found due under an award from the company to the judgment debtor for a loss by fire, and ordering payment thereof. Subsequently, the Judge of the County of Essex, notwithstanding the opposition of the company, made a similar order to pay \$208 to another creditor, on the ground that when the summonses in the Division Court of the County of Wentworth were issued there was no attachable debt due. The company unsuccessfully applied to the Judge of the County of Wentworth to rescind his orders, and then filed a bill calling on the defendants, the different attaching creditors, to interplead:—Held (Spragge, C., dissenting), affirming the judgment of Proudfoot, V.-C., 23 Gr. 568, that it was not a proper case for interpleader; per Burton and Moss, J.J.A., that the bill was not sustainable, for the attaching creditors in Wentworth had obtained judgments in the Division Court against the plaintiffs, with which the Court of Chancery could not interfere; per Burton and Patterson, J.J.A., that, under the circumstances, the Judge of the County Court of Essex had no power to make a summary order for payment; per Patterson, J.A., the rights of all parties might be adjusted in the suit in the County Court of Essex, and if dissatisfied with the decision there the plaintiffs might appeal from it, *Victoria Mutual Fire Insurance Co. v. Bethune et al.*, 1 App. R. 398.

As to solicitor's lien for costs, see *Shippey v. Grey*, W. N. (1880) 99; *Faithful v. Ewen*, L. R. 7 Ch. D. 495; *Cuthbert v. Commercial Travellers' Association*, 7 Pr. R. 255; *Wardell v. Trenouth*, 8 Pr. R. 142.

### 371.

6. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Court or Judge shall direct, shall bind such debts in his hands.

See Eng. R. Sup. C., O. XLV., r. 3; R. S. O., c. 50, s. 307.

It is not indispensable that the service should be personal, *Ward v. Vance*, 3 Pr. R. 130. See also notes to O. XLVII., r. 3.

"Bind."—See as to construction put upon the word "bind," *Holmes v. Tutton*, 5 El. & B. 65; *Turner v. Jones*, 1 H. & N. 878; *Tilbury v. Brown*, 30 L. J. Q. B. 46; and see also, *Sweetnam v. Lemon*, 13 U. C. O. P. 534; *Tate v. The Corporation of the City of Toronto*, 10 U. C. L. J. 66. See R. S. O., c. 50, s. 308.

### 372.

7. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

See Eng. R. Sup. C., O. XLV., r. 4; R. S. O., c. 50, s. 309.

**O. XLI.  
R. 7.**

Upon payment into Court the garnishee is freed from the responsibility, *Clark v. Clark*, 8 U. C. L. J. 107. The subsequent execution by the debtor of a composition deed, will not prevent the creditor being entitled to the money paid into Court, *Culverhouse v. Wickens*, L. R. 3 C. P. 295.

Even after default the Judge has a discretion, *Clark v. Perry*, 26 L. T. 46; the Judges may use any of the garnishee clauses at their direction, *Jones v. Jenner*, 27 L. T. 191, *Lee v. Gorrie*, 1 U. C. L. J. N. S. 76.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

*Form.*—For form of order to pay over, see Forms, No. 135.

### 373.

8. If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

See Eng. R. Sup. C., O. XLV., r. 5.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Be tried or determined in any manner."—The former mode of trying such issues or questions was provided for by R. S. O., c. 50, s. 310, which was as follows:—If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, may order that the judgment creditor may proceed against the garnishee by writ, calling upon him to shew cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor if less than the judgment debt, and for costs of suit, and the proceedings upon such suit shall be the same, or as nearly as may be the same, as upon a writ of revivor issued under this Act.

See as to the various modes of trying issues, notes to sec. 47 of the Act.

To entitle the garnishee to an order for an issue to determine his liability he must satisfy the Judge that he has real ground for disputing it, *Newman v. Rook*, 4 C. B. N. S. 434; and that he is acting *bona fide*, *Wise v. Birkenshaw*, 29 L. J. Ex. 240; and see *Seymour v. The Corporation of Brecon*, 29 L. J. Ex. 243.

Where an action is pending against the garnishee at the suit of the judgment debtor, and there be no collusion between them, the Court will not proceed under this rule, *Richardson v. Greaves*, 10 W. R. 45.

If the garnishee disputes his liability and the judgment creditor declines to proceed to have the liability determined, the garnishee is entitled to have the attaching order discharged with costs, *Wintle v. Williams*, 3 H. & N. 288.

### 374.

9. Where in proceeding to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or Judge may order such third person to appear and state the nature and particulars of his claim upon such debt.

See Eng. R. Sup. C., O. XLV., r. 6; R. S. O., c. 50, s. 313.

### 375.

10. After hearing the allegations of such third person under such order, and of any other person whom by the same or any

subsequent order the Court or a Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or may order any issue or question to be tried or determined according to the preceding Rules of this Order, and may bar the claim of such third person, or may make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable.

See Eng. R. Sup. C., O. XLV., r. 7; R. S. O., c. 50, s. 313, sub-s. 2.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

For form of order, see Forms, No. 135.

### 376.

11. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceedings may be set aside or the judgment reversed.

See Eng. R. Sup. C., O. XLV., r. 8; R. S. O., c. 50 s. 317.

The mere issue of an attaching order is no defence to an action by the judgment debtor against the garnishee, *Lockwood v. Nash*, 18 C. B. 536; *Denton v. Maitland*, 11 Jur. 42. Service of the order was at one time supposed to afford a defence, *Carr v. Baycroft*, 4 U. C. L. J. 209; *McNaughton v. Webster*, 6 U. O. L. J. 17, but it is now settled that the garnishee is not discharged as against the judgment debtor, until at all events served with an order for the payment of the money, *Turner v. Jones*, 1 H. & N. 878; *Newman v. Rook*, 4 C. B. N. S. 434; *McGinnis v. The Corporation of Yorkville*, 21 Q. B. 163, 171. The more correct opinion seems to be that until payment made or execution executed under the order to pay, the garnishee is not discharged, *Blevins v. Madden*, 11 C. P. 195; *Sykes v. The Brockville and Ottawa Railway Co.* 22 Q. B. 459. Payment to the judgment creditor under the attaching order, but before the order to pay is not a discharge, *Turner v. Jones*, 1 H. & N. 878; *Clark v. Clark*, 8 U. C. L. J. 107; but see *Cooper v. Brayne*, 27 L. J. Ex. 446; *Lockwood v. Nash*, 18 C. B. 536.

See *Victoria Mutual Insurance Co. v. Bethune*, 1 App. R. 398, as to practice where orders made in respect of the same debt in different counties.

### 377.

12. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be taken by any person upon application to the proper officer.

See Eng. R. Sup. C., O. XLV., r. 9; R. S. O., c. 50, s. 320.

For the form of book sanctioned by the Court under the corresponding section of the Com. Law Pro. Act, R. S. O. c. 50, s. 320; see rules of Prac. Trin. Term, 1356, No. 58, sch. A, form 60.



## 378.

O. XLII.  
R. 13.

13. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, including the examination of the debtor, shall be in the discretion of the Court or a Judge.

See Eng. R. Sup. C., O. XLV., r. 10; R. S. O., c. 50, s. 321.

This is a re-enactment of R. S. O., c. 50, s. 321.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

## ORDER XLII.

## WRIT OF POSSESSION (LANDS).

## 379.

O. XLII.  
R. 1.

1. A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

See Eng. R. Sup. C., O. XLVIII., r. 1; G. O. Chy. No. 294.

A somewhat similar provision is contained in O. XXXVIII., r. 3, which see.

Has the judgment to be served before a writ can issue? See next rule.

## 380.

2. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person on, or at any specified time after, being served with the judgment, the person prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit shewing due service of such judgment and that the same has not been obeyed.

The words "on, or at any specified time after, being served with the judgment" are not in the corresponding Eng. O. XLVIII., r. 2.

In Chitty's Forms (11 ed.) p. 566 (note) it is said that "the affidavit is only necessary in cases within this rule, i.e. where the judgment directs the defendant to 'deliver up possession.' The judgment on an award is in this form." In other cases it is presumed the writ can issue immediately after judgment is entered.

By G. O. Chy. No. 294, it was provided that "it shall not be necessary to issue a writ of attachment or injunction upon an order for delivery of possession, but the party prosecuting the order, upon filing with the Clerk of Records and Writs an affidavit of service of the same, and of non-compliance therewith, shall be entitled without further order to a writ of assistance." The affidavit need not shew an existing non-compliance, but only non-compliance with the terms and order to be enforced, *Webster v. Taylor*, 18 Jur. 869.

## 381.

3. A writ of possession shall have the effect of a writ of assistance as well as of a writ of *habere facias possessionem*.

## ORDER XLIII.

## WRIT OF DELIVERY (CHATELS).

## 382.

A writ for delivery of any property other than land or **O. XLIII.** money may be issued and enforced in the manner heretofore **R. 1.** in use in actions of detinue in the Superior Courts of Common Law.

Where an action is brought for the specific delivery of chattels, the plaintiff may, upon default of appearance, have judgment for the delivery of the chattels under **O. IX., r. 7,** and may then enforce that judgment under this Order, *Ivory v. Cruikshank*, W. N. (1875) 249.

## ORDER XLIV.

## CHANGE OF PARTIES BY DEATH, &amp;c.

## 383.

1. An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of **O. XLIV.** action survive or continue, and shall not become defective by **R. 1.** the assignment, creation, or devolution of any estate or title *pendente lite*.

See Eng. R. Sup. C., O. 50, r. 1; R. S. O., c. 50, s. 228.

"If the cause of action survive."—These words mean, if the cause of action survive to some one before the Court, *Eldridge v. Burgess*, L. R. 7 Ch. D. 411; *Jackson v. N. E. Ry. Co.*, L. R. 5 Ch. D. 844. It was therefore held that upon the bankruptcy of a sole plaintiff the action could only be carried on by the trustees, *Jackson v. N. E. Ry. Co. ante*. Where one of such trustees refuses to proceed the other may do so, making his co-trustee a defendant, *Ibid*. But the bankruptcy of some of the defendants will not cause an abatement where the liability of the defendants was joint and several, *Lloyd v. Dimmack*, L. R. 7 Ch. D. 398. As to what actions survive, see *Twycross v. Grant*, L. R. 4 C. P. D. 40.

*Death of sole plaintiff.*—Where a sole petitioner dies after an order made on the petition directing inquiries, and whilst those inquiries are pending, the Court will order the petition to be continued and carried on by the representatives of the petitioner, *In re Atkins' estate*, L. R. 1 Ch. D. 82. A sole plaintiff died insolvent, and, so far as could be ascertained, intestate. On the application of the sole defendant for an order appointing a person to represent the estate of the plaintiff, that he the defendant might have an opportunity to move for the dismissal of the action in default of due prosecution thereof, the Court made the order appointing a person to represent the deceased plaintiff's estate, *Wingrove v. Thompson*, L. R. 11 Ch. D. 419.

*Bankruptcy of sole plaintiff.*—In *Eldridge v. Burgess*, L. R. 7 Ch. D. 411, after issue had been joined and notice of trial given by the sole plaintiff in the action, he filed a liquidation petition, under which a trustee of his property was appointed. When the action came up for trial no one appeared for the plaintiff or for the

**O. XLIV.  
R. 1.**

trustee, and there was no evidence that any notice of the action had been served on the trustee:—Held, that rule 1 of Ord. L. (Ont. Act O. XLIV., r. 1,) applies only when the cause of action survives or continues in some person who is before the Court; that the action had abated, and that the only order that could be made was to strike the action out of the list; and see *Jackson v. N. E. Ry. Co.*, L. R. 5 Ch. D. 844, *supra*.

*Death or bankruptcy of sole defendant.*—In a creditor's action for administration against an executrix, a decree had been made and a summons taken out for a receiver, but pending the summons the sole defendant died. The Court, on the application of the plaintiff, appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator, and to accept short notice of motion to discharge the receiver, *In re Parker, Cash v. Parker*, L. R. 12 Chy. D. 293.

A sole defendant, by whose insolvency the suit has abated, may nevertheless move to dismiss the bill for want of prosecution, *Riddell v. Ritchie*, 6 P. R. 205.

*Death of one defendant.*—An action was brought against three defendants, claiming damages in respect of their alleged conspiracy and false representations. Before the action could come on for trial one of the defendants died. Administration was taken out to his estate. The plaintiff did not apply for an order of course to continue the proceedings against the administrator, but he obtained in Chambers an order giving him leave to amend the writ and statement of claim by adding the administrator as a defendant and by making allegations that the estate of the intestate had been benefited by reason of the matters complained of in the action. The administrator was served with notice of the summons on which the order was made, but did not appear on the hearing, and the order was drawn up on the production of an affidavit of service of the summons on him. The order as drawn up was dated as of a date prior to the date of the filing of the affidavit. The writ and statement of claim having been amended in pursuance of the order were served on the administrator. He then entered a conditional appearance and moved to discharge the order for irregularity:—Held, that the order had been regularly made under Ord. XXVII., rule 1, (Ont. O. XXIII., r. 1) and Ord. XVI., rule 13 (Ont. O. XII., r. 15). But held, that the administrator ought not to have been served with the summons, and that the order must be amended by striking out the affidavit of service:—Held, however, that the order must bear date the day on which the affidavit was filed, *Ashley v. Taylor*, L. R. 10 Ch. D. 768. Where two of five defendants, jointly and severally liable to the plaintiff, had become bankrupt:—Held, that the action might proceed against the other three defendants without bringing the trustees in bankruptcy of the two bankrupt defendants before the Court, or giving them notice of the proceedings, *Lloyd v. Dimmack*, L. R. 7 Ch. D. 398.

A defendant became bankrupt after service of notice of trial, and the common order of revivor was then made against his trustee, and served on him. The trustee did not enter an appearance; notice was served on him that the action was restored to the paper for trial, but he did not appear at the trial:—Held, that the same was sufficient, *Chorlton v. Dickie*, L. R. 13 Ch. D. 160.

*Defendant dead at date of judgment.*—Bill and interrogatories served on defendant E., who took no notice of them; bill consequently ordered to be taken *pro confesso* against him; judgment drawn up accordingly. Upon attempting to serve E. with judgment it was found that he was dead at date of the decree, leaving no legal representative; ordered that upon filing an affidavit verifying the circumstances under which the present application was made, E.'s widow be served with notice that within six weeks from date of such service the Court would appoint a representative and direct payment, unless in the meantime the widow appeared to contest, *Alforth v. Espinach*, 36 L. T. N. S. 367.

*Liability of new plaintiff for costs.*—An order under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities; he becomes in effect a substantive party to the suit, and is personally liable to costs, *Boynton v. Boynton*, L. R. 4 App. Ca. 733.

*Dismissal of action in default of revivor.*—A motion by a defendant to dismiss after an abatement issued by the bankruptcy of a sole plaintiff and before revivor

was refused; his proper course being to serve the assignee of the plaintiff in insol- **O. XLIV.**  
vency with notice to revive within a limited time, *Cameron v. Eager*, 6 P. R. 117. **R. 1.**

A bill was filed against two executors and other persons; one of the executors, against whom charges of breach of duty were made by the bill, died; a motion by the surviving defendants, including the co-executrix of deceased defendant, to compel the plaintiff to revive, or in default that the bill be dismissed, was refused:—Held, that the proper parties to make such an application were the representatives of deceased defendant, and that the surviving defendants might move to dismiss for want of prosecution in the usual way, *Watson v. Watson*, 6 P. R. 229.

Where a plaintiff had made default in delivering his statement of claim, and had since become bankrupt, notice of motion to dismiss for want of prosecution was ordered to be served on the trustees in bankruptcy, although under Rules of Court (1875), O. L., r. 1, (Ont. O. XLIV., r. 1,) the action had not become abated by the bankruptcy, *Wright v. Swindon, Marlborough and Andover Railway Company, L.* R. 4 Ch. D. 164.

*Other cases.*—When a suit abates between the hearing and decree, judgment may be given without reviving, *Collinson v. Lister*, 20 Beav. 355; *Belsham v. Percival*, 8 Ha. 157; *Boucicault v. Delafield*, 12 W. R. 8; so a decree may be drawn up, though the suit has abated since it was pronounced, *Beamish v. Pomeroy*, 1 Ch. Ch. R. 32; *Galbraith v. Armstrong*, 1 Ch. Ch. R. 33. Where the suit abates after decree, any defendant who has an interest therein, may revive, on the plaintiffs neglecting to do so; but if the defendant desires not only to revive, but also to get the conduct of the suit, he must serve notice of motion for the order, *Noble v. Stow*, 30 Beav. 512.

A creditor, who in a creditor's suit has proved a claim on the estate, is considered a plaintiff for the purpose of reviving, *English v. Hayman*, 9 Ha. app. 88; *Lowes v. Lowes*, 2 D. M. & G. 784; even though the report allowing his claim has not been signed, *Inchley v. Allsop*, 9 W. R. 649. On the lunacy of a plaintiff, his committee may revive by the common order, *Dangar v. Stewart*, 9 W. R. 266; *Timpson v. London and North-Western Railway Co.*, 11 W. R. 558; so where a change of interest has taken place by a necessary party coming into existence during the pendency of the suit, *Fullarton v. Martin*, 1 Drew. 238; *Phippen v. Brown*, 1 Jur. N. S. 698; *Pickford v. Brown*, 1 K. & J. 643; and see *Jebb v. Tugwell*, 20 Beav. 461.

Where some proceedings have been taken in the suit in ignorance of the abatement, an order can be obtained directing that future proceedings should be carried on against the new parties, see *Freeman v. Pennington*, 3 D. F. & J. 296; and the Court in such a case has jurisdiction to affirm past proceedings where the new parties consent, *Howston v. Briscoe*, 7 W. R. 394; *Smith v. Horsfall*, 24 Beav. 331; but no such order can be made except by consent, *Graham v. Davis*, 2 Ch. Ch. R. 187.

### 384.

2. In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

See Eng. R. Sup. C., O. L., r. 3; G. O. Chy. No. 337; R. S. O., c. 50, s. 229.

In Daniell's Chy. Pr. (5th ed.) p. 242, it is said:—"Incumbrancers, or purchasers becoming such after a bill has been filed and served and registered as a *lis pendens*, will be bound by the decree, and need not be made parties to the suit, whether the plaintiff have notice of them or not; for an alienation pending a suit is void, or rather voidable; therefore, where a purchaser took exception to a title because two mortgagees, who became such after the bill was filed, were no parties to the foreclosure, the exception was overruled with costs; and it has been held that where one of several plaintiffs assigned all his equitable interest, *pendente lite*, the suit might be heard as if there had been no such assignment. Where, however, a sole plaintiff assigned all his equitable interest absolutely, and where all the adult plaintiffs assigned their equitable interest by way of mortgage, the assignees were held necessary parties. But in cases where a change in the ownership of the legal

**O. XLIV.**  
**R. 2.**

estate takes place pending the suit, by alienation or otherwise, the new owner must be brought before the Court in some shape or other, in order that he may execute a conveyance of the legal estate. If a person takes, *pendente lite*, an assignment of the interest of one of the parties to the suit, he may, if he pleases, make himself a party to the suit by supplemental proceedings, but he cannot, by petition, pray to be admitted a part as a party defendant. All that the Court will do is to make an order that the assignor shall not take the property out of Court without notice."

An order was made at the trial to add as a co-defendant a person to whom the defendant had assigned his interest, *pendente lite*, *King v. Rudkin*, L. R. 6 Ch. D. 160.

**385.**

3. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party, may be obtained on *præcipe*, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

See Eng. R. Sup. C., O. 50, r. 4; R. S. O., c. 38, s. 40; Imp. Act, 15 & 16 Vic., c. 86, s. 52; G. O. Chy. No. 537.

In *Twycross v. Grant*, 4 C. P. D. 40, an action was brought to recover from the promoters of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them omitted to disclose certain contracts which ought to have been specified therein. After judgment, and pending an appeal to the House of Lords, the plaintiff died:—Held, affirming the decision of the Common Pleas Division, that under Order LX., rule 4 (Ont. Act, O. XLIV., r. 3), the plaintiff's interest in the action survived, and was capable of transmission to his personal representatives.

For form of appearance by a party added under this rule, see Forms, No. 79.

**386.**

4. An order so obtained shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties to the action or their solicitors, and also upon each such new party (unless the person making the application be himself the only new party), and the order shall from the time of such service, subject nevertheless to the next 5 following Rules be binding on the persons served therewith.

See Eng. R. Sup. C., O. L., r. 5; G. O. Chy. No. 333.

**387.**

5. Where any person who is under no disability, or under no disability other than coverture, or being under any disability

other than coverture, has a guardian *ad litem* in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within 12 days from the service thereof.

O. XLIV.  
R. 5.

See Eng. R. Sup. C., O. L., r. 6; G. O. Chy. No. 339.

"*Court or a Judge.*"—It was held in *Carr v. Moffatt*, 9 U. C. L. J. N. S. 52, that an application to set aside an order of revivor should be made to the Court and not in Chambers, and *Nicholson v. Peile*, 2 Beav. 497, was not followed.

"*To discharge or vary such order.*"—The order being obtained *ex parte* is liable to be objected to by any parties to the suit, *Jackson v. Ward*, 1 Giff. 30; and if obtained on a false statement of facts will be discharged, *Brignall v. Whitehead*, 30 Beav. 229.

The defendants though aware that A. had no interest in the matters in question, made him a party plaintiff, by order of revivor obtained on *præcipe*. A. was then and for some time afterwards under the belief that he had been made a party properly; and even after he found out that he had been made a party improperly he did not apply to have the order of revivor set aside as against him, till he found that he was prejudiced by it. He then petitioned to have the order set aside as against him; and the Court granted the application, on the terms of his paying the costs of the petition, and any costs that had been incurred by his having been made a party, *Smith v. Gunn*, 2 Ch. Ch. R. 230.

An order of revivor was obtained in the cause on the ground that the sole plaintiff had assigned all his interest, etc., to one Close. The plaintiff applied to the Court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained. *Proudfoot, V. C.*, discharged the order of revivor with costs, *Fisken v. Ince et al.*, 8 P. R. 147.

"*Title of action.*"—It is not necessary to add to the title of an action the name of a person who, under O. XLIV., r. 2, has been substituted as plaintiff in that action, *Seear v. Lawson*, 29 W. R. 45.

"*Within 12 days.*"—The application must be made and not merely the notice of motion served within the time limited, *Harris v. Meyers*, 16 Gr. 117; *McIlroy v. Hawke*, 3 Ch. Ch. R. 66; and see *Fox v. Wallis*, L. R. 2 C. P. D. 45; *Jackson v. Gardner*, 15 Gr. 425.

As to computation of time, see notes to O. LII.

### 388.

6. Upon every copy of such order served, there shall be indorsed a memorandum in the form or to the effect set forth in Form 20 in Appendix (B) hereto.

See G. O. Chy. No. 341.

### 389.

7. Where any person being under any disability other than coverture, and not having had a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary such order, at any time within 12 days from the appointment of a guardian *ad litem* for such party, and until such period of 12 days shall have expired such order shall have no force or effect as against such last mentioned person.

See Eng. R. Sup. C., O. L., r. 7; G. O. Chy. No. 340.

"*Court or a Judge.*"—See notes to rule 5 of this Order.

"*Within 12 days.*"—See notes to rule 5 of this Order.



**390.**

**O. XLIV.  
R. 8.**

8. Where the order is served out of Ontario, the party served is to have the same time to apply to discharge the order, as a defendant has to appear to a writ of summons so served; but an application may be made for shortening the time.

See G. O. Chy. No. 342.

The time for appearance of persons served out of the jurisdiction is regulated by O. VII., r. 2.

**391.**

9. Where the Court or a Judge authorizes publication instead of service, the Court or Judge is at the same time to appoint such time for applying to discharge the order as seems proper.

See G. O. Chy. No. 343.

---

**ORDER XLV.****TRANSFERS AND CONSOLIDATION OF ACTIONS.****392.**

**O. XLV.  
R. 1.**

1. Actions may be transferred from one Division of the High Court to another Division by order of the Presidents of such Divisions.

Under the English rule (O. LI., r. 2) an order may be made by "the Court or any Judge of the division to which the action is assigned," but the consent of the President of the Court to which it is proposed to assign the action had to be obtained. Under the present rule, if taken literally, the Presidents of both Courts have to *make* the order.

**393.**

2. The Presidents of the Queen's Bench, Chancery and Common Pleas Divisions shall, from time to time as occasion may require, meet together and examine the list of motions, rules and other matters set down for argument in each Divisional Court of the High Court, and direct the transfer of such and so many of the said motions, rules and other matters from one Divisional Court to another as shall, as nearly as possible in their judgment, equalize the amount of business to be done by the said Courts.

See 41 Vic. (Ont.), c. 8, s. 4.

**394.**

3. Where an order has been made for the administration of the assets of any testator or intestate, a Judge of any Division shall have power, without any further consent, to order the

transfer to such Division of any action pending in any other Division by or against the executors or administrators of the testator or intestate whose assets are being so administered.

O. XLV.  
R. 3.

See Eng. R. Sup. C., June, 1876, r. 18.

### 395.

4. Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner heretofore in use in the Superior Courts of Common Law.

See Eng. R. Sup. C., O. LI., r. 4.

The term "consolidation of actions" is used in two senses. First, if a plaintiff brings two actions against the same defendants for matters which might have been combined in one, and the double proceeding appears to be vexatious, the Court may, in the exercise of its ordinary power to prevent any abuse of its own process, consolidate the actions; that is, it will stay proceedings absolutely in one action, and require the plaintiff to include the whole of his claims in the other; and this has been done with costs against the plaintiff, see *Cecil v. Briggs*, 2 T. R. 639; *Anon.* 1 Chitty, 709 (a); *Beardsall v. Chetham*, E. B. & E. 243. But the term consolidation is more frequently used in a different sense. Where actions are brought by the same plaintiff against different defendants, but the questions in dispute in all are substantially the same, the Court will, on the application of the defendants, stay proceedings in all the actions except one, until that one action has been determined, upon the terms that the various defendants agree to be bound by the event of the action which proceeds. This practice was first introduced by Lord Mansfield, in the case of actions against the several underwriters upon policies of insurance; but it has since been applied to many other cases, as in the case of separate guarantees by different instruments of separate parts of a debt, *Sharp v. Lethbridge*, 4 M. & G. 37; joint and several obligors of a bond conditioned for the good behaviour of another person, *Anderson v. Towgood*, 1 Q. B. 245; principal and sureties on a replevin bond, *Bartlett v. Bartlett*, 4 Scott, N. R. 779; the several members liable upon a mutual insurance policy, *Lewis v. Barkes*, 4 C. B. N. S. 330. So where a number of actions against different defendants may be reduced to classes, those of each class raising the same questions, the Court may allow one action of each class to proceed, and stay the rest, *Syers v. Pickersgill*, 27 L. J. Ex. 5; and see *Smith v. Whichcord*, 24 W. R. 900.

The order is made on the application of the defendant, and without the necessity of any consent on the plaintiff's part, *Hollingsworth v. Brodrick*, 4 A. & E. 646. It binds the defendants in the actions which are stayed to abide the event of the one which proceeds; but it does not bind the plaintiff to do so; and if the result of the first action is against him, he may proceed with another, *Doyle v. Anderson*, 1 A. & E. 635; *Doyle v. Douglas*, 4 B. & Ad. 544. A consolidation order may be obtained at any time after service of the writ, *Hollingsworth v. Brodrick*, 4 A. & E. 646.

The Court may re-open the consolidation order and allow a second action to be defended, notwithstanding that the plaintiff succeeded in the first action. But it will require a very strong case to induce it to do so; probably a case as strong as would be required to procure a new trial, see *Foster v. Alvez*, 3 Bing. N. C. 896.

One of a number of actions brought by different plaintiffs against the same defendants in respect of an alleged misrepresentation in the prospectus of a company, was ordered to be a test action, the trial of which was to bind all the plaintiffs, but not to bind the defendants; when the test action came on the plaintiff did not appear, and judgment was given for the defendants:—Held, that though the order contained no express provision to that effect, the Court had power to substitute another of the actions as the test action, and that as the trial of the original test action had failed to be a real trial of the issue between the plaintiffs and the defendants, without any fault of the other plaintiffs, this substitution ought to be made, *Amos v. Chadwick*, L. R. 9 Ch. D. 459. In the absence of agreement the plaintiff in an action constituted a test action, has no right to be indemnified against costs by the other plaintiffs, *Id.*

## ORDER XLVI.

INTERLOCUTORY ORDERS AS TO MANDAMUS, INJUNCTIONS, OR  
INTERIM PRESERVATION OF PROPERTY, &C.

## 396.

O. XLVI.  
R. 1.

1. Where by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

See Eng. R. Sup. C., O. LII., r. 1.

"*Established*."—The meaning of the word "established" seems to be admitted on the pleadings if there are pleadings, or shewn to the satisfaction of the Court or Judge if there are no pleadings. See rule 5.

"*Court or a Judge*."—See notes to O. IV., r. 1 (a).

## 397.

2. It shall be lawful for the Court or a Judge, on the application of any party to an action, to make any order for the sale, by any person or persons named in such order, and in such manner and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

See Eng. R. Sup. C., O. LII., r. 1.

"*Court or a Judge*."—See notes to O. IV., r. 1 (a).

"*Sale*."—An order in an action may be made for the sale of a horse, which for a "just and sufficient reason it may be desirable to have sold at once," *Bartholomew v. Freeman*, L. R. 3 C. P. D. 316. In this case the ownership of the horse was in dispute. The application was for the purpose of saving the expense of keeping it pending the litigation. An order for the sale was made.

## 398.

3. It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action; and for all or any of the purposes aforesaid to authorize any person or persons to enter upon or into any land or building in the possession of any party to such action; and for all or

any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

See Eng. R. Sup. C., O. LII., r. 3.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"Preservation."—Under this rule the Court has jurisdiction in a proper case to grant an interim injunction to restrain a defendant from ceasing to pump water out of a mine, *Strelley v. Pearson*, L. R. 15 Ch. D. 113.

In a suit instituted for the purpose of setting aside a contract for the purchase of a colliery on the ground of fraud and misrepresentation, the plaintiffs being the purchasers in possession—Held, considering the nature of the property, it was for the benefit of all parties that pending the litigation a receiver and manager should be appointed, *Gibbs v. David*, 44 L. J. Ch. 770.

In an action for the return of jewelry which A. B., as the agent of the plaintiffs had left with the defendants, but which the defendants claimed to hold against a debt due to them by the said A. B., who had, as they alleged, deposited it with them as his jewelry and not as the plaintiffs, the Court made an order under Order LII., rule 3 (Ont. O. XLVI., r. 3), for the delivery up of such jewelry to an officer of the Court to abide the event of the action, *Velati v. Braham*, 46 L. J. Com. Law, 415.

In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels upon an *ex parte* motion, before appearance of the defendant, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to Chambers for that purpose, which the Vice-Chancellor had directed. The plaintiff undertook to deal with the property only under the direction of the Court, and to abide by any order which the Court might make as to damages or otherwise, *Taylor v. Eckersley*, L. R. 2 Ch. D. 302.

*Upon such terms as may seem just.*—An injunction to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms and conditions as the Court shall think just," (see sec. 17 of the Act, sub-a. 3). The terms and conditions which the Court thought just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only, if the rent was paid into Court, *Shaw v. Earl of Jersey*, L. R. 4 C. P. D. 120, 359.

### 399.

4. An application for an order under section 17, sub-section 8, of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said sub-section 8, it may be made either *ex parte* or on notice, and if for an order under the said Rules 2 or 3 of this Order, it may be made, after notice to the defendant, at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance, by the party making the application.

See Eng. R. Sup. C., O. LII., r. 4.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

**O. XLVI.  
R. 4.**

*Any party.*—A defendant in an action may, before judgment, apply for an injunction and a receiver. The defendant may do so notwithstanding that the plaintiff has already served a notice of motion for the like purpose; and in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to the plaintiff, *Sargant v. Read*, L. R. 1 Ch. D. 600.

*Ex parte.*—This rule authorises the making of an order on the application of the plaintiff either *ex parte* or on notice. It will not in general be made *ex parte*, but in a case of emergency it will, *Melnish v. Milton*, 24 W. R. 679.

Where a defendant has had notice of motion for an injunction, it is improper to grant an injunction against him *ex parte*, though the pressure of business may be such as to prevent the motion on notice from being brought on, *Graham v. Campbell*, L. R. 7 Ch. D. 491; see *Hennesy v. Bohmann*, W. N. (1877) 14, *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. D. 582.

**400.**

5. An application for an order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings, or, if there be no pleadings, is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge.

See Eng. R. Sup. C., O. LII., r. 5.

**401.**

6. No writ of injunction shall be issued in any case. An injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction now has.

See Eng. R. Sup. C., 1880, r. 32.

**402.**

7. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counter-claim to recover, specific property other than land, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a Judge, at any time after such last mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or Judge, may order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it.

See Eng. R. Sup. C., O. LII., r. 6.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

An injunction operated from the date of the order, *Rattray v. Bishop*, 3 Mad. O. XLVI. 220; and in pressing cases the plaintiff might before the order had been drawn up, give the defendant notice of the fact that it had been obtained, and if there was no delay in getting the order drawn up, and the writ sealed and served, the defendant might be committed for a breach after such notice, *Vansandau v. Rose*, 2 J. & W. 264; *Kimpton v. Eve*, 2 V. & B. 349; *Lewes v. Morgan*, 5 Price, 518. The copy of an injunction must be personally served, *Ellerton v. Thirsk*, 1 J. & W. 376.

## 403.

8. Where the trusts of any will or settlement are being administered, and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the Judge shall otherwise direct.

See Eng. R. Sup. C., March, 1879, r. 7.

## ORDER XLVII.

## MOTIONS AND OTHER APPLICATIONS.

## 404.

1. Where by these Rules any application is authorized to be made to the Court or a Judge in an action, such application shall be made by motion.

See Eng. R. Sup. C., O. LIII., r. 1.

"Court or a Judge."—See notes to O. IV., r. 1 (a).

"By motion."—There could be no doubt that these words were used as distinguished from *Summons* or *Rule Nisi*, and that a notice of motion should be given, were it not for the use of the same words in O. XXXV., r. 2, where from the context it is apparent that a Rule Nisi is to be applied for. The practice in England, however, under a similar rule is to apply upon notice of motion, and this together with the argument to be deduced from the form of notice of motion given (S. Forms, No. 10), renders it reasonably clear that such notice should be given.

Where notice had been given of a motion before the Court to rescind a Judge's order, and the parties giving the notice did not appear, the Court ordered them to pay the costs of the other party appearing to shew cause against the motion, *Berry v. The Exchange Trading Company*, L. R. 1 Q. B. D. 77. On the 20th of December, 1875, the plaintiff served on the defendants a notice that the Court would be moved on the 22nd, or as soon after as counsel could be heard, to reinstate for argument a demurrer in which judgment had been given for the defendants in the absence of the plaintiff. On the 11th and 12th of January, 1876, the defendants appeared in Court by their counsel to oppose the motion, but no one appeared for the plaintiff:—Held, that the notice was bad on two grounds: 1, because under the Judicature Act, 1875, Sch. Order LXI., rule 1, the Michaelmas sittings terminate on the 21st December; and 2, because there were not two clear days between the 20th and 22nd, as required by Order LIII., rule 4, (Ont. O. XLVII., r. 4.); and that the defendants therefore were not bound to appear, and were not entitled to their cost of doing so, *Daubney v. Shuttleworth*, L. R. 1 Ex. D. 53.

*Chamber applications.*—See O. XLVIII., r. 1; O. XLIX., r. 11.



## 405.

O. XLVII.  
R. 2.

2. No rule or order to shew cause shall be granted in any action or matter, except in the cases in which an application for such rule or order is expressly authorized by these Rules.

See Eng. R. Sup. C., O. LIII., r. 2.

"*Except in the cases.*"—A motion for a new trial under O. XXXV., r. 2, is an exception.

"*In any action.*"—This rule differs from the corresponding English rule, in which the words "or matter" do not occur. That rule was held to apply only to rules or orders made in action and not to such a proceeding as an application to enforce or set aside an award, *re* Phillips and Gill, L. R. 1 Q. B. D. 78; Robinson *v.* Robinson, 24 W. R. 675.

## 406.

3. Except where (by the practice existing at the time of the passing of the said Act) any order or rule has heretofore been made *ex parte* absolute in the first instance, and except where by these Rules it is otherwise provided, and except where the motion is for a rule or summons to shew cause only—no motion shall be made without previous notice to the parties affected thereby. But the Court or Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte*, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just; and any party affected by such order may move to set aside or vary the same.

See Eng. R. Sup. C., O. LIII., r. 3.

"*Practice existing.*"—Under the English practice, prior to the Judicature Acts, a notice of motion could be served either on the party personally or at his residence, Con. Ord. III., r. 6; and it was accordingly held, under the present rule, that a notice of motion might still be served by leaving it at the residence, *re* a Solicitor, L. R. 14 Ch. D. 152; but see Mann *v.* Perry, W. N. (1881) 4. There was not, however, in Ontario any similar practice.

Orders granted as of course, should be served as soon as possible, Church *v.* Marsh, 2 Ha. 632.

If a defendant is absconding, notice may be given by posting it up in the office from which the writ of summons issued, Ord. XV., r. 7; see Dymonds *v.* Croft, 24 W. R. 700; Morton *v.* Miller, 24 W. R. 723.

## 407.

4. Unless the Court or Judge give special leave to the contrary, there must be at least 2 clear days between the service of a notice of motion and the day named in the notice for hearing the motion.

See Eng. R. Sup. C., O. LIII., r. 4.

"*Court or a Judge.*"—See notes to O. IV., r. 1 (a).

"*2 clear days.*"—As to computation of time, see O. LII.

## 408.

5. If on the hearing of a motion or other application, the Court or Judge shall be of opinion that any person to whom notice has not been given ought to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof in order that such notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose. O. XLVII.  
R. 5.

See Eng. R. Sup. C., O. LIII., r. 5.

## 409.

6. The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit.

See Eng. R. Sup. C., O. LIII., r. 6.

## 410.

7. The plaintiff shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with a writ of summons to appear in the action, has not appeared within the time limited for that purpose.

See Eng. R. Sup. C., O. LIII., r. 7.

"*Has not appeared within the time limited.*"—Formerly a plaintiff might, without any leave, serve a notice of motion at the same time that he served the bill. Under the present rule, it is probable that this right is taken away, except in the case of an injunction under the next rule, and that until the time for appearance has expired a notice of motion can only be served after leave granted.

## 411.

8. The plaintiff may also, without any special leave, serve a notice of motion for an injunction, and may, by leave of the Court or a Judge to be obtained *ex parte*, serve any other notice of motion, upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the time limited for the appearance of such defendant.

See Eng. R. Sup. C., O. LIII., r. 8.

The leave, which may be obtained *ex parte*, must be stated in the notice of motion, *Hill v. Rimell*, 2 M. & C. 641. The respondent should not appear if the notice is invalid, *Daubney v. Shuttleworth*, L. R. 1 Ex. D. 53.

## ORDER XLVIII.

## APPLICATIONS AT CHAMBERS.

## 412.

O. XLVIII.  
R. 1.

1. Every application at chambers in Toronto authorized by these Rules and not made *ex parte* shall be made in a summary way, on notice instead of by summons.

In England all applications in Chambers are made "in a summary way by summons," Eng. R. Sup. C., O. LIV., r. 1. In Ontario applications at Chambers are to be by notice of motion in Toronto, and by summons elsewhere, O. XLIX., r. 11.

See notes to O. IV., r. 1 (a); and O. XLIX., r. 6 (a), as to what applications can be made at Chambers.

The officer presiding in Chambers will be styled the Master in Chambers, O. XLIX., r. 6.

For form of notice of motion returnable in Chambers, see Forms, No. 11.

For form of order, see Forms, No. 109; and for form of order dismissing a motion, see Forms, No. 146.

It will be observed that the new practice follows the Chancery form of order—using the impersonal—"It is ordered," and not the Common Law form, "I do order."

## 413.

2. An order shall be in the Form No. 109 in Appendix (H) hereto, with such variations as circumstances require. It shall be marked with the name of the Judge or officer by whom it is made.

See Eng. R. Sup. C., April, 1880, r. 39.

"Marked with the name."—The name is placed after the name of the Division and before the style of cause; see the Forms.

## 414.

3. Every appeal to the Court from any decision at chambers shall be by motion, and shall be made within 8 days after the decision appealed against, or if no Court to which such appeal can be made shall sit within such 8 days, then on the first day on which any such Court may be sitting after the expiration of such 8 days.

See Eng. R. Sup. C., O. LIV., r. 6, as amended by R. Sup. C., March 1879, r. 8.

This rule seems to apply to appeals from any decision at Chambers of a Judge; appeals from a County Judge, Master in Chambers, or local Master, are provided for afterwards, Ord. XLIX., r. 13. By this rule the motion must be made within the eight days; it is not enough that notice of motion be given within that time, *Fox v. Wallis*, L. R., 2 C. P. D. 45; and see *Jackson v. Gardner*, 15 Gr. 423; *Harris v. Meyers*, 16 Gr. 117; *Mellroy v. Hawke*, 3 Ch. Ch. R. 66. If the eighth day is a Sunday then, under Ord. LII., r. 4, the motion may be made on Monday, *Taylor v. Jones*, 45 L. J. N. S. C. P. 110.

## ORDER XLIX.

## OFFICERS AND OFFICES.

## 415.

1. All officers shall be auxiliary to one another for promoting the correct, convenient, and speedy administration of business. **O. XLIX. R. 1.**

## 416.

2. Two of the officers of the High Court shall, in addition to their other duties, be judgment clerks of the High Court, for the purpose of settling the form and terms of such special judgments as may be referred to them for that purpose by any Divisional Court, or a Judge of any Division, or by the Master in Chambers.

*"Judgment clerks."*—The Registrars of the Court of Chancery have heretofore discharged the duties now imposed upon the judgment clerks. As to practice upon settling forms of decrees, see notes to O. XXXVII, r. 1.

## 417.

3. Where the offices of Deputy Clerk of the Crown and Deputy Registrar in any county are not held by the same person, the Deputy Clerk of the Crown shall in actions in the Queen's Bench and Common Pleas Divisions have the powers and duties of a Deputy Registrar (not local Master), in addition to the powers and duties heretofore belonging to a Deputy Clerk of the Crown; and the Deputy Registrar shall in actions in the Chancery Division have the powers and duties of a Deputy Clerk of the Crown, in addition to the powers and duties heretofore belonging to a Deputy Registrar. Where the two offices are united in the same person he shall be styled Local Registrar of the High Court; and every reference in these Orders to the said two offices, or either of them, shall be deemed to apply to the Local Registrar.

See G. O. Chy. Nos. 33, 34, 35, 37, 38, 39, 73, etc.

Deputy Registrars performed the duties of their offices in the same manner, and under the same regulations, as the like duties were performed by the Clerk of Records and Writs; and all orders, rules and regulations in force respecting the Clerk of Records and Writs, and respecting the regulation of his office were in force and applicable to the Deputy Registrars, in relation to such duties as they were required to perform; and the like sums and fees payable to the Clerk of Records and Writs were payable to Deputy Registrars in relation to similar matters, G. O. Chy. No. 34. The duties performed by the Clerk of Records and Writs were the receiving, filing and custody of pleadings, reports, depositions, affidavits, and other papers and proceedings, and making entries thereof in the proper books; amending

**O. XLIX.  
R. 3.**

bills, entering consents, and notes *pro confesso*, setting down causes, certifying proceedings, examining and authenticating office copies of pleadings and other proceedings, preparing and issuing writs, commissions and orders of course, attending on the opening of commissions, attending with records and exhibits on the Judges of the Court or elsewhere, G. O. Chy. No. 23. All orders drawn up by the Clerk of Records and Writs without the special direction of the Court, were, before the bill was filed in the office of a Deputy Registrar, to be drawn up by the Deputy Registrar, G. O. Chy. Nos. 37 & 593. Every Deputy Registrar had in his office a book to be called "The Solicitors' and Agents' Book," G. O. Chy. No. 33; and could issue decrees on *præcipe* for foreclosure, sale or redemption, G. O. Chy. Nos. 38, 648. A bill of complaint might be filed either with the Clerk of Records and Writs or with a Deputy Registrar, at the option of the plaintiff, G. O. Chy. No. 77. Certificates of Chancery proceedings for registration may be signed by any Deputy Registrar; see R. S. O., c. 40, s. 89, and c. 111, s. 49.

**418.**

4. Subject to the foregoing Orders, where an action is commenced in the office of a Deputy Registrar or Deputy Clerk of the Crown or Local Registrar, all such orders in the action as require to be entered (except orders made by the County Court Judge or the local Master of the county under the authority and jurisdiction vested in them under these Rules) shall be entered at Toronto; and, where necessary, an office copy of the order so entered shall be transmitted or delivered to the Deputy Registrar, Deputy Clerk of the Crown or Local Registrar to be filed with the proceedings in the action.

See Eng. R. Sup. C., O. XXXV., r. 2.

As to the powers of a County Judge and Local Master, see rule 8 of this Order and sec. 64 of the Act.

**419.**

5. Sections 302 and 303 of the Common Law Procedure Act and section 7 of the "Execution Act" shall apply as nearly as may be to Deputy Registrars as well as Deputy Clerks of the Crown.

See Eng. R. Sup. C., O. XXXV., r. 3.

The sections of the Com. Law Pro. Act, R. S. O., c. 50, are as follows:—Sec. 302. "Every Deputy Clerk of the Crown and Pleas and every County Court Clerk shall keep a regular book, in which shall be minuted and docketed all judgments entered by such Deputy Clerk or County Court Clerk, and such minutes shall contain, (1) The name of every plaintiff and defendant; (2) The date of the issue of the first process; (3) The date of the entry of judgment; (4) The form of action and the amount recovered, exclusive of costs; (5) The amount of costs taxed; and (6) Whether such judgment has been entered on verdict, default, confession, *non pros*, non-suit, discontinuance, or how otherwise." Sec. 303. "Within three months after the entry of each judgment by a Deputy Clerk of the Crown, he shall transmit to the principal Clerk of the proper Court in Toronto every such judgment-roll and all papers of, or belonging thereto, and such judgments shall be also docketed in the principal office; and in case, in any of the Courts, the original judgment-roll happens to be lost or destroyed, so that no exemplification or examined copy thereof can be procured, a copy of the entry in any of such docket books, certified by the Clerk or Deputy Clerk of the Crown, or by the Clerk of the County Court having such book in his custody, shall be evidence of all matters therein set forth and expressed."

The sec. of "The Execution Act," R. S. O., c. 66, is as follows:—Sec. 7. "All writs of execution may issue from the offices wherein the judgment has been entered; and in the Superior Courts of Law, after the transmission of the judgment-roll to the principal office, such writs may, at the option of the party entitled thereto, be issued out of such principal office."

## 420.

6. There shall be an officer of the Supreme Court to be named the Master in Chambers, who, in regard to all actions and matters in the High Court, shall have the power, authority and jurisdiction heretofore in like cases possessed in the Superior Courts respectively, by the Clerk of the Crown and Pleas of the Court of Queen's Bench and by the Referee in Chambers of the Court of Chancery;

(a) The said officer shall not have authority or jurisdiction in respect of the matters excepted in regard to the Clerk of the Crown and Pleas of the Queen's Bench by the Rules of the Judges of the Courts of Queen's Bench and Common Pleas of Hilary Term, 1870, or in respect of the matters excepted in regard to the Referee by the 560th of the orders of the Court of Chancery, or in respect of appeals from Judges of County Courts or Local Masters, or in respect of any other matter which by these orders is expressly required to be done by a Judge of the High Court.

See Eng. R. Sup. C., O. LIV., r. 2.

"Clerk of the Crown and Pleas of the Court of Queen's Bench."—The power, authority and jurisdiction of the Clerk of the Crown and Pleas of the Court of Queen's Bench to transact business in Chambers is governed by 33 Vic., c. 11, s. 5 (now R. S. O., c. 39, s. 29), which empowers the Judges of the Superior Courts of Law to make general rules, "For empowering the Clerk of the Crown and Pleas of the Court of Queen's Bench to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said Courts, or any of them respectively, are now or may hereafter be done, transacted or exercised by a Judge of either of the said Courts sitting at Chambers, and as shall be specified in any such rule, except in respect of matters relating to the liberty of the subject." In pursuance of the authority given by that Act general rules were made 9th Feb., 1870, empowering the Clerk of the Crown and Pleas of the Court of Queen's Bench to "transact all such business, and exercise all such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules and practice of the said Courts, or any of them respectively, were at the time of the passing of the said Act and are now done, transacted or exercised by any Judge of the said Courts sitting at Chambers, except in respect of matters relating to the liberty of the subject, and to prohibitions and injunctions, and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say: All matters relating to criminal proceedings; the removal of causes from inferior Courts, other than the removal of judgments for the purpose of having execution; the referring of causes under the Com. Law Pro. Act; reviewing taxation of costs; staying proceedings after verdict; appeals in Insolvency. In all such excepted matters, not being matters relating to the liberty of the subject, the said Clerk may issue a summons returnable before a Judge, 'That in case any matter shall appear to the said Clerk of the Crown to be proper for the decision of a Judge, the Clerk may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Clerk with such directions as he may think fit.'"

JORK UNIVERSITY



**O. XLIX.**  
**R. 6.**

By 37 Vic. (Ont.), c. 7, s. 47, the authority conferred upon the Judges therein mentioned, by the 5th section of the "Act respecting proceedings in Judge's Chambers," passed in the 33rd year of Her Majesty reign, shall, subject to the exception therein contained, extend to empowering the Clerk of the Crown and Pleas of the Court of Queen's Bench to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction as are now, or may be hereafter done, transacted or exercised by a Judge of either of the Superior Courts of law sitting at Chambers. No further general rules were made since the passing of this Act.

"*Referee in Chambers.*"—The appointment of a Referee in Chambers is provided for by 34 Vic., c. 10, s. 1, now R. S. O., c. 40, s. 8. By G. O. Chy. No. 560, he was "empowered to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, or by virtue of any statute or custom or by the practice of the said Court, is now done and transacted by a Judge of the Court sitting in Chambers, except the matters following; (1) granting writs of *habeas corpus*, and adjudicating upon the return thereto; (2) appeals and applications in the nature of appeals; (3) proceedings as to lunatics under the Consolidated Statutes of Upper Canada, c. 12, s. 33, and the 28th Vic., c. 17, s. 5 to 11 inclusive; (4) applications for writs of arrest; (5) petitions for advice under the Property and Trusts Act, 29th Vic., c. 28, s. 31; (6) applications as to the custody of infants, under the Consolidated Statutes of Upper Canada, c. 74, s. 8; (7) applications as to leases and sales of settled estates, to enable minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court, in the form of special cases on the part of such persons as may by themselves, their committees, or guardians, or otherwise, concur therein, under the 28th Vic., c. 17, s. 1; (8) opposed applications for administration orders; (9) opposed applications respecting the guardianship of the person and property of infants; (10) *ex parte* injunctions; (11) proceedings as to partition and sale of real estate, under the Ontario Statute, 32 & 33 Vic., c. 33; (12) applications for leave to appeal, or rehear after the time limited for that purpose has elapsed."

Under R. S. O., c. 40, s. 28, the Court may empower him to transact any business at Chambers, except granting writs of *habeas corpus*, and adjudicating upon the return thereof; appeals and applications in the nature of appeals; proceedings under the 61st to 65th sections inclusive of this Act; applications for writs of arrest; applications for advice under the Trustee Acts; matters affecting the custody of children; and proceedings under the 85th section of this Act. No further General Orders have been made by the Court on this subject.

"*Required to be done by a Judge.*"—See notes to O. IV., r. 1 (a).

As to the authority which County Court Judges had before the passing of the Judicature Act, see R. S. O., c. 50, s. 148; see also new Judic. Act, sec. 71.

## 421.

7. Any official Referee, upon the request of the Master in Chambers or of a Judge of the High Court, may sit with or for such Master; and while sitting for him shall have all the authority and power of such Master, but shall not be entitled to any fees.

See R. S. O., c. 38, s. 9.

## 422.

8. The County Court Judge of the County in which an action is brought shall, from and after the first day of January, 1882, have the same power and authority in the action as the Master in Chambers aforesaid, save and except that the authority of such County Court Judges shall not extend to grant-

ing leave for service out of Ontario, or to allowing service out of Ontario, of a writ of summons or of notice of a writ of summons; provided also that in counties in which there is a local Master who does not practise as a Barrister or Solicitor, and who has not taken out a certificate to practise, such local Master shall, in regard to causes and actions brought in his county in the Chancery division, have (in addition to his powers as a local Master) the jurisdiction, power, and authority hereinbefore given to the County Court Judge; and in such counties the County Court Judge shall have and exercise the said jurisdiction, power, and authority only in regard to causes and actions brought in his county in the Queen's Bench and Common Pleas Divisions;

See Eng. R. Sup. C., June, 1876, r. 19; R. S. O., c. 50, s. 148.

"As the Master in Chambers."—See rule 6 of this Order.

"Granting leave of service out of Ontario."—By O. VII., r. 4, it is not necessary before serving the writ to apply to the Court or a Judge to allow the service.

"In addition to his power as local Master."—Where a bill is filed with a Deputy Registrar, the Local Master and Deputy Registrar respectively in the county where such bill has been filed, are to have all such powers and authorities in relation to such suit as belong to the Master and Clerk of Records and Writs respectively, G. O. Chy. No. 35. In addition to the powers and authorities conferred upon Local Masters by this Order, the Local Master in the county where the bill has been filed may hear and dispose of all applications in the progress of such suit for the following purposes: (1) To appoint guardians *ad litem* for infants; (2) for time to answer or demur; (3) for leave to amend before replication; (4) to postpone the examination of witnesses, or to allow further time for the production of evidence; (5) for security for costs, G. O. Chy. No. 36. Local Masters also perform the duties of their offices in proceeding upon references made to them by the Court under decrees or orders in the same manner and under the same regulations as the Master does. See G. O. Chy. No. 34.

(a) The power and authority of a County Court Judge under this Rule shall not apply to any action in which the writ is issued in the County of York, or (except by consent) to any action wherein the solicitors for all parties do not reside or have not offices in the county town of the county in which the action is brought, or wherein any party who has no solicitor does not reside in, or has not a place of business in, the county or union of counties. Such consent by a solicitor may be general by a memorandum in writing filed in the office of the Deputy Registrar or Deputy Clerk of the Crown; or may be confined to any particular action or application and be manifested as in the case of any other consent by a solicitor in a cause or matter.

See R. S. O., c. 50, s. 148, sub-s. 2.

As to *ex parte* orders, see the next rule.

#### 423.

9. The power and authority of a County Court Judge to make *ex parte* orders shall not be subject to the limitation set

**G. XLIX.**  
**R. 9.**

forth in the preceding paragraph (a), and may be made though the Solicitors for all parties do not reside in the same County.

By rule 8 it is provided, however, that certain *ex parte* orders cannot be made by a County Judge.

#### 424.

10. But no money shall be distributed or paid out for costs or otherwise, without the order of a Divisional Court, or of a Judge of the High Court in court or chambers, (except money paid into court by a defendant by way of satisfaction or amends, and not belonging in whole or in part to an infant or *feme covert*); and on the application for such order, the Court or Judge may review, amend or refer back to the master his report or order, or make such other order as the Court or Judge deems proper.

See G. O. Chy. No. 639.

#### 425.

11. Every application to a County Court Judge or local Master under the Act or these Rules shall, where notice of the application is necessary, be made in a summary way by summons;

See Eng. R. Sup. C., O. XXXV., r. 5.

Applications at Chambers in Toronto are to be upon notice of motion, O. XLVII., r. 1.

(a) A summons shall be in the form No. 108 in Appendix (H) hereto, with such variations as circumstances require. It shall be addressed to all the persons on whom it is to be served;

See Eng. R. Sup. C., April, 1880, r. 34.

(b) A summons shall be prepared by the applicant or his solicitor, and shall be signed by the proper officer and when so signed shall be deemed to be issued. The person obtaining a summons shall leave a copy thereof with the officer signing the same.

See Eng. R. Sup. C., April, 1880, r. 35.

#### 426.

12. If any matter appears to the County Court Judge, Master in Chambers or local Master to be proper for the decision of a Judge of the High Court, he may refer the same to such Judge;

and such Judge of the High Court may either dispose of the matter, or refer the same back to the County Court Judge or officer aforesaid with such directions as such Judge of the High Court may think fit.

O. XLIX.  
R. 12.

See Eng. R. Sup. C., O. XXXV., r. 3.

This is a re-enactment of Reg. Gen. 9th Feb, 1870, which provided "That in case any matter shall appear to the said Clerk of the Crown to be proper for the decision of a Judge, the Clerk may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Clerk with such directions as he may think fit." The Referee in Chambers has a similar power of referring to a Judge, G. O. Chy. No. 562.

#### 427.

13. Any person affected by any order or decision of the County Judge or officer aforesaid may appeal therefrom to a Judge of the High Court at Chambers;

(a) Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the Judge or officer aforesaid had jurisdiction only by consent;

(b) The appeal shall be by motion, on notice served within 4 days after the decision complained of; or within such further time as may be allowed by a Judge of the High Court or by the County Court Judge or officer aforesaid whose decision is complained of;

(c) The motion shall be made within 8 days after the decision has been made which is appealed against, or within such further time as may be allowed as aforesaid;

(d) In such case, the Deputy Registrar, Deputy Clerk of the Crown or local Registrar, shall, on a præcipe being filed in this behalf, transmit to the proper officer of the High Court of Justice all documents filed in his office and required for disposing of the appeal; and the same shall be transmitted by mail, prepaid and registered, except where all parties interested in such documents file a consent to any other mode of transmission. The said documents shall be returned in like manner when the appeal has been disposed of;

(e) The appeal shall be no stay of proceedings unless so ordered by a Judge of the High Court or by the Judge or officer whose decision is complained of.

See Eng. R. Sup. C., O. XXXV., rr. 7, 8, 14; O. LIV., rr. 4-6.

**O. XLIX.****R. 13.**

Before the passing of the Judicature Act the time for appealing in Chancery from an order made by the Referee in Chambers was fourteen days, *G. O. Chy. No. 566*. The motion had to be actually made within the fourteen days; it was not sufficient to give the notice of appeal within that time, *Jackson v. Gardner*, 15 Gr. 425; *Fox v. Wallis*, L. R. 2 C. P. D. 45; *Crom v. Samuels*, *Id.* 21. An appeal did not lie until the order was signed and entered, *Gibb v. Murphy*, 2 Ch. Ch. R. 132.

At Common Law, appeals from an order or decision of the Clerk of the Crown and Pleas of the Court of Queen's Bench, were by summons taken out within four days after the decision complained of, or such further time as might be allowed by a Judge or the said Clerk, Reg. Gen. 9th Feb. 1870.

"*Within 4 days*," "*within 8 days*."—As to computation of time, see O. LII.

By the English Order of March, 1879, r. 6, if no Court sits within the 8 days, then the appeal may be on the first day on which the Court does sit, *Stirling v. Du Barry*, L. R. 5 Q. B. D. 65.

As to when time will be extended, see *Gibbons v. London Finance Association*, L. R. 4 C. P. D. 263, and notes to sec. 38 of the Act.

This rule so far as it enacts that an appeal to the Court from a decision at Chambers shall be made within 8 days is peremptory, and there is no appeal after the expiration of such time, unless the Court, under O. LII., r. 9, enlarge the time, *Crom v. Samuel*, 46 L. J. C. L. 1; L. R. 2 C. P. D. 21.

## ORDER L.

## COSTS.

## 428.

**O. L.****R. 1.**

1. Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried or the Court shall otherwise order.

"*Costs of and incident*."—"The costs of and incident to all proceedings in the High Court," means the costs of and incident to all proceedings that have actually come into the High Court, and not of proceedings prior to the action, *re Brandreth's Trade Mark*, L. R. 9 Ch. D. 618.

"*In the discretion of the Court*."—See notes to sec. 32 of the Act.

In an action for damages for breach of covenant, the defendant denied the breach, and also paid money into Court, alleging that it was enough to satisfy the claim. The plaintiff replied, joining issue, alleging that the money was not enough, and the issues having been referred to an official referee, he reported that the money paid in was enough to satisfy the claim. The costs were held to be in the discretion of the Court, and that the discretion in such cases ought to be exercised by allowing the plaintiff his costs up to the time of payment into Court, and allowing the defendant his costs after that time, *Buckton v. Higgs*, L. R. 4 Ex. D. 174; but see *Langridge v. Campbell*, L. R. 2 Ex. D. 281.

g in Chancery  
O. Chy. No.  
was not suffi-  
15 Gr. 425;  
appeal did not  
n. R. 132.

of the Crown  
nt within four  
be allowed by

ee O. LII.

in the 8 days,  
Stirling v.

ociation,

sion at Cham-  
deal after the  
erge the time,

of and in-  
in the dis-  
all deprive  
costs out  
e entitled  
of Equity:  
a jury, the  
n made at  
hom such  
order.

ceedings in  
s that have  
the action, re

d the breach,  
y the claim.  
enough, and  
t the money  
he discretion  
ed by allow-  
allowing the  
174; but see

"*Shall follow the event.*"—The effect of this rule is to repeal the statutes which formerly regulated the costs in certain actions at law. In *Parsons v. Tinling*, L. R. 2 C. P. D. 119, Lord Coleridge, C. J., said: "The order is made under the Judicature Act, the express object of which was to bring under one system those diverging codes of law and practice previously known as Common Law and Equity. I assent to the view of the plaintiff's counsel that, speaking broadly and leaving out of sight certain cases in which comparatively recent statutes have interfered, at Common Law the costs followed the event, and were not in the discretion of the Judge, as in Equity they were. The manifest object of the Act was to assimilate the practice at Law and Equity, and to make one rule for all divisions of the one Court. Reading the order by the light of this intention its meaning seems plain enough. The general rule is to be that costs are to be in the discretion of the Court, but there is a reservation of the right to costs to which certain innocent parties, such as trustees, had been previously entitled in Equity, and a provision that when the action is tried by a jury the costs are to follow the event, unless at the trial, for good cause shewn, the Judge or the Court shall otherwise order." In that case the plaintiff recovered one farthing damages for libel, and the Judge at the trial refused to give any certificate as to costs:—Held, that the plaintiff was entitled to costs. This decision was approved of in *Garnet v. Bradley*, L. R. 3 App. Ca. 944; see also *Tenant v. Ellis*, L. R. 6 Q. B. D. 46.

"The event" mentioned in the order is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation, *Field v. The Great Northern Railway Company*, L. R. 3 Ex. D. 261; and see cases under *Reference*, *post*.

Where, on the trial of an action a non-suit is directed, which is set aside and a new trial granted, and on the second trial the plaintiff has a verdict and judgment, the plaintiff is entitled to the costs of the first trial, and of the rule for a new trial as part of the costs which follow the event, *Green v. Wright*, L. R. 2 C. P. D. 334. But the Judge at the second trial has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs, even when the action is tried before a jury. In an action to recover a sum of £85, and also a sum of six shillings, the plaintiff was non-suited; a new trial having been ordered, at the second trial, which took place before a jury, he failed as to his claim for £85, but proved his claim for six shillings. The Judge ordered that the plaintiff should pay the costs of both trials.—Held, that the order was right and could not be set aside, *Harris v. Petherick*, 4 Q. B. D. 611.

"*Application made at the trial.*"—A judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs, even when the action is tried by a jury, *Harris v. Petherick*, L. R. 4 Q. B. D. 611. At the trial of an action by a jury the Judge may, without any application having been made to him, order that the costs shall not follow the event, *Turner v. Heyland*, L. R. 4 C. P. D. 432. The application to the Judge must be at the trial and not subsequently in Chambers, *Baker v. Oakes*, L. R. 2 Q. B. D. 171; but where no application or order as to costs is made at the trial, the Divisional Court has jurisdiction to entertain an application to deprive the plaintiff of costs, *Bower v. Bell*, *Brooks v. Israel*, *North v. Bilton*, *Siddons v. Lawrence*, L. R. 4 Q. B. D. 95, 495. The Divisional Court has original jurisdiction to deprive a successful party of the costs of an action tried before a jury, *Myers v. Defries*, L. R. 4 Ex. D. 176.

*Reference*.—A cause having been referred to a Master, as a matter of account, and the order of reference being silent as to the costs, the Court refused an application for an order for costs on behalf of the party in whose favour the award was made, *Wimhurst, Hollick & Co. v. The Barrow Ship Building Co.*, L. R. 2 Q. B. D. 335.

When in the same action the jury find for the plaintiff with damages as to one cause of action, and for the defendants as to other, and distinct, causes of actions, the word "event" in the proviso to the Rules of Court, O. LV., r. 1, (Ont. O. L., r. 1), must be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the Judge who tried the cause or by the Court, *Myers v. Defries*, L. R. 5 Ex. D. 180.

The plaintiff, who had built two houses for the defendant at a contract price of £1,135, sued for £169 16s., the balance of the price, and for other small items. The defendant raised various defences, and also counter-claimed, £1,209 for penalties for delay and for damages arising for bad work. The pleadings went as far surrejoinder, after which, the cause, with all matters in difference, was referred to an architect



**O. L.**  
**R. 1.**

as arbitrator, upon the terms, *inter alia*, that the costs of action, reference, and award, should follow the event, unless the arbitrator should otherwise order. The arbitrator by an award, silent as to costs, awarded £3 2s. 6d. to the defendant in respect of the action and matters in difference:—Held, affirming the judgment of the Queen's Bench Division that the word "event" ought to be construed distributively, and the award remitted to the arbitrator to find specific issues, *Ellis v. Desilva*, L. R. 6 Q. B. C. P. & Ex. D. 521.

*Costs where no jurisdiction over cause of action.*—As to the Court's power over costs where it has no jurisdiction over the subject matter of an application, see *Brown v. Shaw*, L. R. 1 Ex. D. 425; *Great Northern Committee and Inett*, L. R. 2 Q. B. D. 284.

Successful appellants are generally to have their costs, *Memorandum*, L. R. 1 Ch. D. 1.

*Trustees.*—See *re Hoskins' Trusts*, L. R. 6 Ch. D. 281.

*Partnership.*—As to costs of a partnership action, see *Hamer v. Giles*, L. R. 11 Ch. D. 942; *Downey v. Roaf*, 6 Pr. R. 89.

*Counter-claim.*—See notes to sec. 16, subs. 4 of the Act.

## 429.

2. In any cause or matter in which security for costs is required, the security shall be of such amount and be given at such time or times and in such manner and form, as the Court or a Judge shall direct.

See Eng. R. Sup. C., Feb. 1876, r. 7; G. O. Chy. No. 321.

*Statutes.*—R. S. O., c. 50, s. 70, is as follows:—In addition to any cases in which a defendant in any action may by any law or by the practice of the Courts be entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any action or proceeding in which it is made to appear satisfactorily to the Court or a Judge in Chambers that the plaintiff has brought a former action or proceeding for the same cause, which is pending either in Ontario or in any other country, or that he has judgment or rule or order passed against him in such action or proceeding with costs, and that such costs have not been paid, and such Court or Judge may thereupon make such rule or order, staying proceedings until such security is given as to the Court or Judge seems meet. By sec. 71 persons suing as informers or for penalties may in certain cases be ordered to give security for costs.

R. S. O., c. 51, s. 73, is as follows: "If any person brings an action of ejectment after a prior action of ejectment for the same premises has been unsuccessfully brought by him or by any person through or under whom he claims against the same defendant, or against any person through or under whom he defends, the Court or a Judge may, on the application of the defendant at any time after his appearance entered, order that the plaintiff shall give to the defendant security for the payment of costs, and that all further proceedings in the cause shall be stayed until such security is given, whether the prior action was disposed of by discontinuance or by non-suit, or by judgment for the defendant."

42 Vic. (Ont.) c. 15, s. 2, is as follows: "Where by any law, or by the practice of the Courts, a defendant in any action is entitled to obtain security for costs from a plaintiff, the Court or Judge, by whom any rule or order for such security is made, may require the plaintiff to furnish the security within a time to be limited in such rule or order, or by any subsequent rule or order." Sub-s. 2: "If any person fails, without sufficient excuse, to comply with such rule or order he shall be liable to have his action dismissed as for want of prosecution, with costs, and the Court or a Judge may make an order accordingly, and thereupon judgment of *non pros* may be entered."

*Plaintiff out of jurisdiction.*—Security for costs may be required where the plaintiff is, or all of several plaintiffs are, out of the jurisdiction. *Walker v. East-erby*, 6 Ves. 612; and a plaintiff domiciled abroad, and only temporarily within the jurisdiction, had to give security, *Ainslie v. Sims*, 17 Beav. 57; *Perott v. Novelli*,

reference, and  
the order. The  
defendant in  
the judgment of  
the instructed distri-  
ct judge, Ellis v.

the power over  
the application, see  
Innett, L.  
R. 1

Giles, L. R.

costs is re-  
given at  
the Court

cases in which  
the Courts be-  
lieve costs may be  
given in which it is  
that the plain-  
tiff is pending  
or rule or order  
that such costs  
like such rule or  
Court or Judge  
may in certain

of ejectment  
unsuccessfully  
claims against  
from he defends,  
at any time  
to the defen-  
dant in the  
proceedings in the  
prior action was  
the defendant."

the practice of  
for costs from a  
security is made,  
limited in such  
any person fails,  
shall be liable to  
and the Court or  
of non pros.

where the  
Walker v. East-  
man v. Novelli,

9 Jur. 770; see *Swanzy v. Swanzy*, 4 K. & J. 237; *Cambottie v. Inngate*, 1 W. R. 533. So if a plaintiff goes abroad during the suit, *Green v. Charnock*, 1 Ves. 396; *Hoby v. Hitchcock*, 5 Ves. 699; *Blakeney v. Dufaur*, 2 D. M. & G. 771; *Edwards v. Burke*, 9 L. T. N. S. 406; *Kenaway v. Tripp*, 11 Beav. 588; *Stewart v. Stewart*, 20 Beav. 322; but if the plaintiff goes abroad on public service, or for a temporary purpose, the rule does not apply, see *Colebrooke v. Jones*, 1 Dick. 154; *Evelyn v. Chippendale*, 9 Sim. 497; *Clark v. Ferguson*, 1 Giff. 184; *Lumley v. Hughes*, 2 W. R. 112; *O'Connor v. Sierra Nevada Company*, 23 Beav. 608.

Security will not be ordered against a plaintiff abroad when it is shewn that he has property within the jurisdiction, *White v. White*, 1 Ch. Ch. R. 48; *Galt v. Spencer*, 2 Ch. Ch. R. 92; nor where there is evidence of his intention to return, *White v. Greathead*, 15 Ves. 2; *Blakeney v. Dufaur*, 2 D. M. & G. 771; and see *O'Grady v. Munro*, 7 Gr. 106; *Harvey v. Smith*, 1 Ch. Ch. R. 392; but see also *Marsh v. Beard*, 1 Ch. Ch. R. 390. Mere intention to go abroad is no ground for ordering security, *Wyllie v. Ellice*, 11 Beav. 99. Order discharged on plaintiff coming within the jurisdiction, *Matthews v. Chichester*, 30 Beav. 135.

A plaintiff out of the jurisdiction, with no certain place of abode, and having no property in this Province, though stating on affidavit that she was only temporarily absent and intended to return, was ordered to give security for costs, there being no circumstances from which the Court could reasonably infer that the intention to return would certainly be carried out, *Grant v. Winchester*, 6 Pr. R. 44.

Where it appears that the residence of the plaintiff is not known, and that there is reason to believe he has left the country, security for costs will be ordered to be given, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and is not shewn positively where he is resident, *Somerville v. Kerr*, 2 Ch. Ch. R. 168.

*Plaintiff out of jurisdiction but having property within.*—A plaintiff resident abroad will not be released from giving security for costs, unless he shew that he has property to the value of \$400 within the jurisdiction of the Court, and available in execution. Leasehold property may be sufficient. The plaintiff had property within the jurisdiction, consisting of a one sixth interest (nominally worth \$2,666) in lands subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. This lease was for twenty-one years, and gave the defendants an option to purchase; under its terms no rent or taxes were to be paid until the title had been quieted under the Act for Quieting Titles, or a certificate was refused. In the latter event the defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending. The plaintiff's interest in this property was held insufficient to entitle him to the discharge of an order for security, *Higgins v. Manning*, 6 P. R. 147.

A suit was brought to recover possession of certain lands, of which the plaintiffs claimed to be the trustees, and to restrain the defendant, an over-holding tenant, from committing waste. An order for security for costs had been obtained against the plaintiffs by reason of their being out of the jurisdiction. The plaintiffs applied to discharge the order on the ground that they had property within the jurisdiction, and the property relied on was the property in question in this suit:—Held, that the plaintiffs not being entitled in their own right to the property, it did not constitute sufficient security for costs, *McKenzie v. Sinton*, 6 P. R. 282.

The subsequent acquisition of property is no ground for rescinding an order for security for costs, *Reaume v. Leavitt* and *Reaume v. Trowbridge*, 6 P. R. 70.

On the plaintiff shewing he had lands in the Province worth \$4,000, an order for security for costs obtained on *præcipe* was set aside, and the order being also irregular in form, it was set aside with costs, *Ganson v. Finch*, 3 Ch. Ch. R. 296.

*Misdescription of plaintiff.*—Security may be required where a plaintiff misdescribes himself, *Sandys v. Long*, 7 Sim. 140; *Oldale v. Whiteher*, 5 Jur. N. S. 84; *Somerville v. Kerr*, 2 Ch. Ch. R. 168; but if misdescription innocently inserted, and the defendant knows the real address, security will be refused, *Hurst v. Padwick*, 12 Jur. 21; *Smith v. Cornfoot*, 1 D. & S. 684; and for instances of accidental errors, see *Watts v. Kelly*, 6 W. R. 206; *Clark v. Clark*, 14 W. R. 449; and if the plaintiff cannot be found at the address given, it is the defendant's duty to make inquiries from his solicitor before applying for security, *Knight v. Cory*, 11 W. R. 254; *Manby v. Bewicke*, 8 D. M. & G. 468.

**O. L.**  
**R. v.**

The Court will order a plaintiff to give security for costs if he misdescribes himself in his bill through an improper motive, or with the intention of misleading the defendant, even though on the application for security the plaintiff should furnish his true address. A plaintiff who had been for several years, and was at the time of the filing of the bill, resident in the United States, described herself in her bill as of the Township of Bertie, in the Province of Ontario. Under these circumstances the Court refused to discharge an order for security, although the plaintiff had returned to the jurisdiction and stated that in was her intention to reside there for the rest of her life, *Waldron v. McWalter*, 6 P. R. 145.

*Second suit for same cause of action.*—See statutes quoted *ante*. Held, on an application for security for costs, under Con. Stat. U. C., c. 27, s. 76, that the fact of the costs of the former unsuccessful actions having been paid, is not a ground for refusing to make an order, *Chambers v. Unger*, 6 P. R. 101.

In *Curtiss v. McNabb*, 7 P. R. 246, certain proceedings in the Surrogate Court, by the present plaintiff, were determined in favour of the defendant, and judgment was given for him, with costs to be paid out of the estate. The plaintiff then filed her bill, raising substantially the same questions as those tried in the Surrogate Court:—Held, that the plaintiff could not be ordered to give security for the costs of the present suit (under 29 & 30 Vic., c. 42, s. 1,) for the costs of the former proceedings were not payable by her, but out of the estate.

To bring a case within the statute, 29 & 30 Vic., c. 42, (R. S. O., c. 50, s. 70,) requiring security for costs, where another action for same cause is pending, it must be clearly shewn the causes of action are identically the same, and not merely growing out of the same transaction. And, *quere*, does the Act apply at all to this Court, or to a case where one action is at law and the other in this Court, *Dean v. Lamprey*, 2 Ch. Ch. R. 202.

*Where plaintiff is only a nominal party.*—The plaintiff will be ordered to give security for costs, where it is shewn that he is insolvent, and is carrying on the suit for the benefit of another party who seeks to escape the risk of costs, *Mason v. Jeffrey*, 2 Ch. Ch. R. 15.

Where the plaintiff had parted with his interest in the land in question, proceedings were stayed until security for costs should be given or the defective state of the record cured, *Swan v. Adams*, 7 P. R. 147.

Where the assignee of one of the plaintiffs, who had obtained his discharge in insolvency, brought an action in the name of the plaintiffs on an old judgment which had been assigned to the insolvent by the other plaintiffs, and to the benefit of which the assignee was entitled, he was ordered to give security for costs, *Boice v. O'Loam*, 7 P. R. 359.

A petition by the defendant to reduce the amount of alimony allowed in the suit, came to be heard on the fifth of October, when counsel for the plaintiff appeared and procured an enlargement for two weeks, to answer the defendant's affidavits, and on the same day demanded and received copies of them. On the 19th October, the counsel appeared and obtained a further enlargement for two weeks, but before the time expired, applied for an order for security for costs on the grounds: (1) that the petitioner was insolvent; and (2) that the application, though made in the name of the plaintiff, was really for the benefit of a third person:—Held, without expressing an opinion on the merits, that the plaintiff had waived her rights, if any, to such security, *Knowlton v. Knowlton*, 8 P. R. 400.

*Husband and wife.*—An order for security of costs will not be made in an alimony suit, *Bennett v. Bennett*, 7 P. R. 54.

Where a husband brought an action of ejectment in his own name and that of his wife, upon a covenant for re-entry upon default being made in payment of an annuity reserved to them jointly, an application by the wife for security for costs from her husband, on the ground that he was using her name without her authority, was refused, but leave was given to her to renew the application on the Judge being satisfied that there was not a good cause of action, or that there was a good defence, and that she had separate estate liable to execution, *Junkin v. Junkin*, 7 P. R. 362.

*Company.*—As to security to be given by a company, see *Imperial Bank of China v. Bank of Hindostan*, L. R. 1 Ch. App. 437; *City of Moscow Gas Co. v. International Finance Co.*, L. R. 7 Ch. App. 225; *re Home Assurance Association*, L. R. 12 Eq. 59; *Accidental Marine Assurance Co. v. Mercati*, L. R. 3 Ec. 200.

*Solicitor and Client.*—Where on petition against a solicitor for an account, it was alleged, and not denied, that he had large sums of the client's money in his hands, the petitioner, though resident in a foreign country, was relieved from giving security for costs. The rule requiring security for costs is not so positive and inflexible but that the Court will relax it in their discretion where the circumstances of the case require it, *re Carrol*, 2 Ch. Ch. R. 305.

In *re A. B.*, an attorney, 6 P. R. 210, it was held, that the fact that a client who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not a sufficient ground for security for costs, but, upon special circumstances being shewn, it may be.

*Interpleader.*—In *Walker v. Niles*, 3 Ch. Ch. R. 108, it was held, that the claimant under an interpleader issue, if out of the jurisdiction, is bound to give security for costs.

*Waiver.*—As to a defendant waiving his right by taking voluntary steps in the cause after notice of the facts entitling him to security, see *Atkins v. Cooke*, 3 Dr. 694; *Smith v. Day*, 2 Ch. Ch. R. 456; *Knowlton v. Knowlton*, 8 Pr. R. 400. If he acts without such notice he does not lose his right though he might have discovered the facts by inquiry, *Swanzy v. Swanzy*, 4 K. & J. 237; see *Washoe Mining Co. v. Ferguson*, L. R. 2 Eq. 371; *Pendry v. O'Neil*, 7 P. R. 52; nor if the proceedings taken by him were forced on him, *re Home Assurance Association*, L. R. 12 Eq. 112; *Macan v. Borradaile*, 16 W. R. 74; by a motion for injunction, *Murrow v. Wilson*, 12 Beav. 497; or for production of documents, *Cooper v. Purton*, 8 W. R. 702; nor where he demurs, *Watteau v. Billam*, 3 D. & S. 516; *Drinan v. Mannix*, 3 Dr. & W. 155.

Security for costs will not be ordered to be given where a defendant has obtained further time to answer, *Arthur v. Brown*, 3 Ch. Ch. R. 396.

Where a defendant had by answering waived his right to security for costs, and the plaintiff assigned his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction, it was held that the defendant was entitled to security for costs against the new plaintiff. The fact that the suit was a foreclosure suit, was held not to disentitle the defendant to the order for security for costs against the plaintiff, although a mortgagor, he disputing that anything was due, and the Master being directed to inquire "what if anything was due," *Thompson v. Callagan*, 3 Ch. Ch. R. 15.

*Practice—Obtaining order.*—If it appears by the indorsement of the writ that the plaintiff resides out of the jurisdiction, the order may be obtained on *præcipe*, O. L. r. 4. In other cases an application must be made upon notice. But an order for security for costs can only be obtained upon *præcipe*, when the plaintiff admits on the face of the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. Where a bill described the plaintiff as "of the City of Toronto," but afterwards contained the following statement, "by the advice of a physician the plaintiff has sought change of air, and is now temporarily resident at Rochester":—Held, that it must be concluded that the residence was only temporary, and no order for security must be granted, *Wilson v. Wilson*, 6 P. R. 152.

*Practice—Form of order.*—In Chancery the usual form of order is, "that the plaintiff do procure some sufficient person or persons, resident within the jurisdiction of this Court, to give security on behalf, in the penal sum of not less than \$400, to answer the costs of the defendant in case this Court shall think fit to award any before the said defendant shall be obliged to put in his answer to the said bill," *Leggo's Forms*, No. 72.

A recent statute (42 Vic. (Ont.) c. 15,) provides as follows:—"Sec. 2. Where by any law, or by the practice of the Courts, a defendant in any action is entitled to obtain security for costs from a plaintiff, the Court or Judge by whom any rule or order for such security is made, may require the plaintiff to furnish the security within a time to be limited in such rule or order, or by any subsequent rule or order. Sub-s. 2. If any person fails, without sufficient excuse, to comply with such rule or order, he shall be liable to have his action dismissed as for want of prosecution, with costs, and the Court or a Judge may make an order accordingly, and thereupon judgment of *non pros* may be entered."

It has been thought that this statute applies to proceedings at law only, but as it prescribes a rule of practice, the principle of which is adopted by the present orders in the case of *ex parte* order (see rule 4 of this Order), it is probable that all orders will now in the first instance, limit the time within which security is to be given.

O. L.  
R. 2.

*Practice—Default of security.*—If the order limits no time within which security is to be given, the proper notice is that the plaintiff do procure some sufficient person, etc., and that in default, the action be dismissed for want of prosecution, *Giddings v. Giddings*, 10 Beav. 29.

*Practice—Form of Bond.*—O. L., r. 3, requires that in future the bond be given to the party or persons requiring the security, and not to an officer of the Court.

In Chancery the practice has been to require security to the amount of \$400, and at Common Law \$200. The amount may now be largely increased in a proper case, *Republic of Costa Rica v. Erlanger*, L. R. 3 Ch. D. 62.

After an order for security for costs had been made, the cause came on to be heard and was postponed on terms which were arranged at the time. Subsequently an application for further security was made:—Held, that such an order could not be made at this stage, as the application should have been made at the hearing, *Simon v. Le Banque Nationale*, 7 P. R. 422.

Instead of giving security by bond the plaintiff may pay money into Court, *Cliff v. Wilkinson*, 4 Sim. 122; as to payment out of the money, see *Luther v. Ward*, 2 Ch. Ch. R. 175.

### 430.

3. Where a bond is to be given as security for costs, it shall unless the Court or a Judge otherwise directs, be given to the party or persons requiring the security, and not to an officer of the Court.

See Eng. R. Sup. C., April, 1880, r. 41; Court of Appeal Orders, March, 1878, No. 2, Ont.; G. O. Chy. No. 321.

### 431.

4. Where it appears, by the writ of summons, notice, or other proceeding by which a suit is instituted, or by an indorsement thereon, that the plaintiff resides out of Ontario, the defendant shall be entitled on præcipe to an order requiring the plaintiff within 4 weeks from the service of the order to give security in \$400 for the defendant's costs of the action staying all further proceedings in the meantime, and directing that in default of such security being given the action be dismissed with costs against such defendant, unless the Court or Judge upon special application for that purpose shall otherwise order.

This follows the Chancery practice, see notes to rule 2 of this Order.

"Within 4 weeks."—As to computation of time, see O. LII.

"Court or Judge."—See notes to O. IV., r. 1 (a).

### 432.

5. Until a tariff of fees payable in stamps or otherwise is provided by Rule of Court, approved by the Lieutenant-Governor in Council, the fees to be so payable shall be the fees now so payable on similar proceedings (if any) in the Courts of Queen's Bench and Common Pleas; and where there is no

similar proceeding in those courts, the fees to be so paid shall be **Q. 1.**  
 The fees now payable on similar proceedings in the Court of **R. 5.**  
 Chancery.

## 433.

6. As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 10 cents per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

See Eng. R. Sup. C. of August 12th, 1875, "Costs," r. 16.

## 434.

7. Where a petition in any cause or matter is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be \$5. The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court.

See R. Sup. C. of Aug. 12, 1875, "Costs," r. 17.

"*Petition.*"—As to unnecessary appearance upon motion, see rule 10 of this Order.

If a petitioner on serving a petition on a respondent, the necessity for whose appearance is a matter of doubt, at the same time offers him forty shillings in order to enable him to get legal advice, and the respondent afterwards appears, the Court will consider whether the appearance be justified or not, and, if it finds that the appearance was not justified, will not order the petitioner to pay the respondent's costs of appearance; otherwise the respondent must have his costs of appearance. *In re Duggan's Trusts*, L. R. 8 Eq. 697. This case was approved of in *Wood v. Boucher*, 19 W. R. 234. Real estate subject to several incumbrances was sold by the first incumbrancer under a power of sale in his mortgage deed, and the surplus purchase money was paid into Court under the Trustees' Relief Act. The second incumbrancer, whose debt was greater than the fund in Court, presented a petition stating the other incumbrances and praying for payment of the fund to himself. This petition was served on the other incumbrancers, with a notice by the solicitor of the petitioner to each incumbrancer that if he appeared on the petition the payment of his costs out of the petition would be resisted:—Held, that the incumbrancers so served who appeared at the hearing of the petition were not entitled to their costs out of the fund, *Roberts v. Ball*, 24 L. J. Chy. 471.



## 435.

O. L.  
R. S.

8. The Court or Judge may, at the hearing of any cause or matter, or upon any application or procedure in any cause or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any pleading, affidavit, evidence, notice to cross-examine witnesses, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary, or contains unnecessary matter, or is of unnecessary length, to be disallowed; or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof, as he shall find to be improper, unnecessary, or to contain unnecessary matter, or to be of unnecessary length. In such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter, or length; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, the taxing officer may look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so.

See Eng. R. Sup. C. of Aug. 12, 1875, "Costs," r. 13.

## 436.

9. In any case in which, under the preceding Rule No. 8, or any other rule of Court, or by order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

See Eng. R. Sup. C. of Aug. 12, 1875, "Costs," r. 19.

By an arbitrator's award in an action the plaintiff was ordered to pay a sum of money to the defendant, and the defendant was ordered to pay the plaintiff a part of his costs when taxed:—Held, that the defendant was entitled to have the debt set off against the taxed costs, and that the right of set-off in such a case was not interfered with by the ordinary solicitor's lien for costs. Rule 28 of Additional Rules of Court ("Costs"), 1875 (Ont. O. L., r. 18), when applied to the Chancery Division does not mean that the old Common Law rules as to costs shall prevail in the Chancery as well as the other Divisions, but that the rules of the old Court of Chancery as to costs shall, except where altered by the new rules, remain in force in the Chancery Division, *Fringle v. Gloag*, L. R. 10 Ch. D. 676.

In *Ross v. McLay*, 7 P. R. 97, it was held that a special lien, given upon the proceeds of a judgment pending an appeal from such judgment, must prevail against an application to set off judgment. It was also held that the Toronto agents of a party suing in person have no lien for the costs incurred in the suit by such agents.

In May, 1875, a deed of separation was executed between defendant and plaintiff, husband and wife, by which defendant was to pay the plaintiff \$100 a year, quarterly, as maintenance. Afterwards in September, 1875, the plaintiff, objecting to the security offered, filed a bill for alimony, and defendant served a notice agreeing to allow her \$100 a year, quarterly, for interim alimony. The plaintiff accepted the notice, and defendant paid this alimony until May, 1876, when a decree was made for specific performance of the agreement, but the plaintiff was ordered to pay defendant's costs:—Held, that the plaintiff must give credit for the sums paid as interim alimony; and executions issued for the whole sum, payable under the agreement, were set aside; the costs payable by plaintiff were also ordered to be set off against the allowance, though such set-off was not asked for in the notice of motion, *Maxwell v. Maxwell*, 7 P. R. 63.

In *Cuthbert v. Commercial Travellers' Association*, Blake, V.-C., said: (7 P. R. 255) "I think I should not interfere to deprive either a solicitor or an attorney of the charge in his favour of the costs where the matters are not identical. It is true, that where there is a matter in issue between the same parties, there is the right to compromise and to set off between the parties, and on the ultimate balance there is a lien for costs. But where there is a different cause of action in different Courts, and the costs are unpaid, I do not think I should deprive either the attorney or solicitor of the right to claim the costs which he has earned as against the person who has been ordered to pay them. I think the plaintiff should pay the costs of the suit and of this application."

#### 437.

10. Where any party appears upon any application or proceeding in Court or at Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance, unless the Court or Judge shall expressly direct such costs to be allowed.

See Eng. R. Sup. C. of 12th August, 1875, "Costs," r. 21.

As to tender of \$5 with a petition, see rule 7 of this Order.

#### 438.

11. There shall be two or more taxing officers of the Supreme Court; and they and each of them shall for the purpose of any proceeding before them or him, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been performed by the Registrar of the Court of Appeal or by any of the Masters, Taxing Officers, Registrars, Deputy Registrars, or other officers of any of the Courts whose jurisdiction is by the Act vested in the High Court of Justice or Court of Appeal; and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Act were vested in any of such officers, including examining witnesses, directing production of books, papers, and

O. L.  
R. 11.

documents, making separate certificates or allocators, requiring any party to be represented by a separate solicitor; and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge.

See Eng. R. Sup. C. of 12th August, 1875, "Costs," r. 23.

See also rule 8 of this Order.

For form of certificate of taxation, see Forms, No. 173.

### 439.

12. The preceding Rule shall not be construed as interfering with the power heretofore possessed by local officers to tax costs;

(a) Every bill of costs in a suit pending in the Court of Chancery at the commencement of the Act, every bill of costs in any action thereafter brought in any Division of the High Court for the administration of an estate, or for partition, or for the foreclosure, redemption or sale of mortgaged premises, and every bill in any other action where the amount is to be paid out of an estate or out of a fund in Court, or where the amount taxed affects the interest of an infant, shall be subject to revision according to the practice hitherto prevailing in the Court of Chancery: and the Orders of that Court numbered from 310 to 313 inclusive shall in other respects be deemed applicable thereto;

(b) In other cases any party interested may as of right have the taxation of the local officer revised, without giving the 2 days' notice to the opposite party required in the 353rd section of the Common Law Procedure Act (R. S. O., ch. 50); which section shall in other respects apply to all the divisions of the High Court;

(c) In the cases last aforesaid, the party desiring the revision shall give notice thereof to the opposite party, and on a præcipe being filed with such local officer, such officer is to transmit the bill to the taxing officer at Toronto for revision, and the practice thereon is to be as provided by the said Chancery Orders;

(d) Pending such revision, judgment may be entered and execution issued, unless the Court or a Judge otherwise orders;

and in case of an execution being so issued, if the amount taxed **§. 1.** is reduced on revision, the party entitled to the costs shall **§. 12.** forthwith give notice of the reduction and of the amount thereof to the Sheriff or other officer in whose hands the execution had been placed; and the amount struck off on the revision shall be deducted from the amount indorsed on the execution.

For the Chancery practice, see G. O. Chy. Nos. 310—313, *post*.

As to objections to be taken before the taxing officer, see rule 20 of this Order.

The taxing officer, on revision of bills of costs taxed by a Local Master, has power under Gen. Orders 311 & 312, not only to strike out items improperly allowed, but also to restore items improperly struck out and generally to review the taxation. Evidence cannot be received by a taxing officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction, *Keim v. Yeagley*, 6 P. R. 60; and see *re Robertson*, 24 Gr. at p. 560.

#### 440.

13. The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

See Eng. R. Sup. C. of August, 1875, "Costs," r. 24.

#### 441.

14. Where any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect.

See Eng. R. Sup. C. of August, 1875, "Costs," r. 25.

#### 442.

15. As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear

O. L.  
R. 15.

to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

See Eng. R. Sup. C. of August, 1875, "Costs," r. 26.

#### 443.

16. Where a solicitor's bill of fees, charges and disbursements as delivered to a client or other person is referred to the Master to be taxed, the solicitor is to give credit for all sums of money by him received from or on account of the said client, and is to refund what, if anything, he may on such taxation appear to have been overpaid;

(a) The Master is to tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and of the cost of the reference, to be paid according to the event of the taxation pursuant to the statute;

(b) The solicitor is not to commence or prosecute any action or suit touching the demand pending the reference without leave of the Court or a Judge;

(c) Upon payment by the said client or other person of what (if anything) may appear to be due to the solicitor, the solicitor (if required) is to deliver to the said client or other person, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the said client;

(d) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions which the Court or Judge shall see fit to make.

See the Attorneys' Act, *post*.

#### 444.

17. The order, when grantable of course, shall be issued on præcipe by the registrar, deputy registrar, local registrar, or deputy clerk of the crown.

#### 445.

18. The rules, orders, and practice of any Court, whose jurisdiction is vested in the High Court of Justice or Court of

Appeal, relating to costs, and to the allowance of the fees of solicitors and attorneys, and to the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act and the Rules of Court in pursuance thereof, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

See Eng. R. Sup. C. of August, 1875, "Costs," r. 28; R. S. O., c. 50, s. 334.

See *Pringle v. Gloag*, L. R. 10 Ch. D. 676, cited in notes to rule 9 of this Order.

#### 446.

19. The taxing officers shall perform their duties under and subject to any supervision which from time to time may appear to the Judges of the Supreme Court to be necessary or proper, and may by them be directed, in order to secure accuracy and uniformity in the proceedings of the taxing officers.

#### 447.

20. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

See Eng. R. Sup. C. of Aug., 1875, "Costs," r. 30.

The following form is from Summerhays & Toogood's Precedents (2nd ed.) p. 45:—

In the High Court of Justice.  
— Division.

[Title of the cause or matter.]

Objections taken by the plaintiff [or defendant] to the taxation by Esquire, one of the Taxing Masters of this Court, of the bill of costs of the plaintiff [or defendant], under the judgment [or order] dated the                      day of                      188 .

The plaintiff [or defendant] objects to the disallowance of the items in his bill of costs mentioned in the 2nd and 3rd columns, hereunder written, for the following reasons:—



C. L.  
E. 30.

No. of Objection.	Page in Bill.	No. of Item.	REASONS FOR ALLOWANCE.
1	1	1 to 6	These items are properly chargeable under the order which gives the plaintiff his costs, charges, and expenses.
2	2	10	The attendance was taken for the purpose of saving expense, and further expense was thereby avoided.
3	4	50	This item is in accordance with the scale.
4	6	90	The inspection of documents was necessary to enable the plaintiff to prepare his cause, and he obtained information as to [set this out] which was of material assistance to him on the trial.
5	7	110	The affidavit was necessary, and was used on the hearing of the summons, and entered in the order.
6	8	120	This item is in the discretion of the Master, and under the special circumstances of the case [set out what these circumstances are] should be allowed.

Dated this                      day of                      188 .

Yours, etc.,

To Mr. C. D.,  
Defendant's Solicitor.

Plaintiff's Solicitor.

#### 448.

21. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

See Eng. R. Sup. C. of Aug., 1875, "Costs," 31.

#### 449.

22. Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as to the Judge may seem just; but the

certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid. O. L.  
R. 99.

See Eng. R. Sup. C. of Aug, 1875, "Costs," 32.

*Discretion of Taxing Officer*.—It has been said that the discretion of the Taxing Officer will not be interfered with, and that only when he has proceeded upon a mistaken principle will an appeal lie from his decision. This has again been said to be too wide a statement, and there are numerous cases where the Court has practically illustrated its belief that its own discretion was more nearly correct than that of the Taxing Officer. The following cases may be referred to as illustrating that the Court will not as a general rule, except under special circumstances, interfere in a matter of discretion, *Fenton v. Crickett*, 3 Madd. 496; *Clarke v. Tyne Improvement Commissioners*, L. R. 3 C. P. 230; *Tillet v. Stracey*, L. R. 5 C. P. 185; *Potter v. Rankin*, L. R. 5 C. P. 518; *Wakefield v. Brown*, L. R. 9 C. P. 410; *Parkinson v. Hanbury*, 13 W. R. 1056; *Cousens v. Cousens*, L. R. 7 Ch. App. 48; *Betts v. Cleaver*, 15. 513; *Hargreaves v. Scott*, L. R. 4 C. P. D. 21; *re Robertson*, 24 Gr. at pp. 560, 562; and the following as a rule that mere *quantum* will not be interfered with, *re Congreve*, 4 Beav. 87; *Friend v. Solly*, 10 Beav. 329; *re Catlin*, 18 Beav. 508; *Turner v. Turner*, 7 W. R. 573; *re Hubbard*, 23 Beav. 481; *Atty.-Gen. v. Draper's Co.* L. R. 9 Eq. 69; but see *Smith v. Buller*, L. R. 19 Eq. 473.

*The items objected to must be specified*, *re Congreve*, 4 Beav. 87. If the items objected to do not amount to £2, the appeal will not lie, *Newton v. Boodle*, L. R. 4 C. B. 350; see also *McQueen v. McQueen*, 2 Ch. Ch. R. 344.

*Costs of a particular proceeding*.—So much of a bill for an account against trustees as charged fraud was dismissed with costs and accounts directed. The Master, in taxing the defendant's costs, had refused to allow to the plaintiff any costs in respect of the interrogatories, answer, or production of documents:—Held, that the Master was not justified in disallowing these items, *Heming v. Leifchild*, 9 W. R. 174.

*Affidavit of increase*.—The Court refused to direct the taxing officer to adopt the practice in the Queen's Bench Division of requiring the solicitor to make an "affidavit of increase," since evidence could be obtained, without such affidavit, of all matters necessary for his information. But the Court declined to lay down any rule that such affidavit of increase should in no case be required, *Smith v. Day*, L. R. 16 Ch. D. 726.

*Revision after payment*.—The bill of costs in a cause having been taxed by the local Master, the plaintiff paid the amount taxed without protest:—Held, that he still was entitled to a revision of taxation before the Master at Toronto, *Kormann v. Tooke*, 6 P. R. 112; and see *Elliott v. Northern Assurance Company*, 10 U. C. L. J. N. S. 16.

*Costs taxed under special statutes*.—Where, under special statutes, costs are directed to be taxed by one of the Masters, there can be no appeal from his decision. *Quare*, whether, if the Master improperly allow costs to one of the parties where he is not entitled to them, or disallow them where the party is entitled to them, the Court can interfere by certiorari or mandamus, *In re The Sheffield Waterworks Act*, 1864, L. R. 1 Ex. 54; in the matter of an inquiry between *Edwin Owen* and the *London and North-Western Railway Company*, L. R. 3 Q. B. 54.

#### 450.

23. Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof unless the Judge shall otherwise direct.

See Eng. R. Sup. C. of Aug., 1875, "Costs," 33.

## ORDER LI.

## NOTICES AND PAPER, &amp;C.

## 451.

O. LI.  
R. 1.

1. All notices required by these Rules shall be in manuscript or print, or partly in manuscript and partly in print, unless expressly authorized by a Court or Judge to be given orally.

See Eng. R. Sup. C., O. LVI., r. 1.

Pleadings and all other proceedings in a cause may be written or printed, or partly written and partly printed; and where wholly printed, dates and sums occurring therein are to be expressed by figures instead of words, G. O. Chy. No. 66.

## 452.

2. Proceedings, if printed, shall be printed with pica type, leaded, on good paper, of foolscap size.

See Eng. R. Sup. C., O. LVI., r. 2.

When the office copy of the bill served upon a defendant was not printed in accordance with the order of Court, the service was set aside with costs, *Cossey v. Ducklow*, 2 Ch. Ch. R. 227.

## 453.

3. Any affidavit may be sworn to either in print or in manuscript, or partly in print and partly in manuscript.

See Eng. R. Sup. C., O. LVI., r. 3.

## ORDER LII.

## TIME.

## 454.

O. LII.  
R. 1.

1. Where by these Rules, or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.

See Eng. R. Sup. C., O. LVII., r. 1.

## 455.

2. Where any limited time less than 6 days from or after **O. L. II.** any date or event is appointed or allowed for doing any act **R. 2.** or taking any proceeding, holidays, as defined by the Interpretation Act, shall not be reckoned in the computation of such limited time.

See Eng. R. Sup. C., O. LVII., r. 2; R. S. O., c. 1, s. 8, sub-s. 16; Reg.-Gen. T. T. 1856, No. 146, Ont.

Where the limited period is not less than 6 days, Sundays are counted, *Ex parte Viney*, W. N. (1877), p. 53; L. R. 4 Ch. D. 794. In such cases it is only when the last day is Sunday that by rule 4 an extension is given.

*Interpretation Act.*—R. S. O., c. 1, s. 16, enacts as follows: The word "holiday" shall include Sundays, New Year's Day, Good Friday, Easter Monday, and Christmas Day, the days appointed for the celebration of the birth-day of Her Majesty and of Her Royal Successors, and any day appointed by proclamation of the Governor General or Lieutenant Governor as a public holiday, or for a general fast or thanksgiving.

## 456.

3. In all cases in which any particular number of days not expressed to be clear days, is prescribed by the Act or the Orders or practice of the Court, the same shall be reckoned exclusively of the first day, and inclusively of the last day.

See Eng. R. No. 174 of Hilary Term, 1853.

This is a re-enactment of G. O. Chy. No. 407. Where the eight days wherein to appeal from Chambers under Order XLVIII., r. 3, expires on a Sunday, the motion may be made the next day, *Taylor v. Jones*, 45 L. J. C. P. 110. The day appointed by the Master's report for the payment of money fell upon a Sunday; the Court refused a final order of foreclosure, though the plaintiff attended at the same place, and between the same hours, on the Saturday and Monday, *Hulcomb v. Leach*, 3 Gr. 449.

## 457.

4. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

See Eng. R. Sup. C., O. LVII., r. 3.

Where the time for appeal ends on a Sunday an application made on the day following is sufficient, *Taylor v. Jones*, L. R. 1 C. P. D. 87.

An order which was a refusal of an application, was made by the London Bankruptcy Court on the 10th of March. An appeal was entered with the Registrar of Appeals on the 4th of April, and on the same day notice was served on the respondent. The Registrar's office had been entirely closed for the Easter vacation from the 30th of March to the 3rd of April, both inclusive:—Held, that notwithstanding the closing of the office, the notice of appeal might have been served on the respondent, and that as it had not been served within twenty-one days the appeal was too late, *Ex parte Saffery*, *In re Lambert*, L. R. 5 Ch. D. 365.

## 458.

O. LII.  
R. 5.

5. The time for delivering or amending any pleading may be enlarged by consent in writing, without application to the Court or a Judge.

See Eng. R. Sup. C., April, 1880, r. 42.

## 459.

6. Service of pleadings, notices, summonses, orders, rules and other proceedings shall be effected before the hour of 6 in the afternoon, except on Saturdays, when it shall be effected before the hour of 2 in the afternoon. Service effected after 6 in the afternoon on any week day except Saturday shall be deemed to have been effected on the following day. Service effected after 2 in the afternoon on Saturday shall be deemed to have been effected on the following Monday.

See Eng. R. Sup. C., April, 1880, r. 43; Reg.-Gen. T. T., 1856, No. 135, Ont.; G. O. Chy. Nos. 410, 411.

Service of a summons on Saturday afternoon after three o'clock, returnable on Monday following, is not good service as being in effect service of a summons on the day on which it is returnable, *Ball v. Cowdley*, 3 U. C. L. J. 131; and see *Connelly v. Bremner*, L. R. 1 C. P. 557.

## 460.

7. No pleadings shall be amended or delivered in the long vacation, except by consent or unless directed by the Court or a Judge.

See Eng. R. Sup. C., O. LVII., r. 4; R. S. O., c. 50, s. 95.

## 461.

8. The time of the long vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, or in the times allowed for other purposes for which the same is not reckoned by the practice of the Courts consolidated by the Act, or any or either of them, or for the like proceedings substituted by the Act, or these Rules; unless otherwise directed by a Court or a Judge.

See Eng. R. Sup. C., O. LVII., r. 5; G. O. Chy. No. 408; R. S. O., c. 50, s. 95.

No declaration or pleading after declaration shall be filed or served between the first day of July and the twenty-first day of August in any year, and the parties respectively in any case shall be entitled to the same number of days after the

to any first day of August to plead to or answer any pleading filed or delivered before the first day of July, to which they would have been entitled had this provision not been made, R. S. O., c. 50, s. 95.

The time for vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes:—(1) Answering either an original or amended bill; (2) Amending or obtaining orders for leave to amend bills; (3) Setting down demurrers; (4) Filing replications, or setting down causes under the directions of Orders 152, 153, 154, 155; (5) Master's reports becoming absolute; (6) Moving to discharge an order of revivor; (7) Moving to add to, vary or set aside a decree by any party served therewith, G. O. Chy. No. 408.

#### 462.

9. A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

See Eng. R. Sup. C., O. LVII., r. 3.

The Court has no power under this rule to extend the time for renewing a writ of summons, where the claim would, in the absence of renewal, be barred by the Statute of Limitations, *Doyle v. Kaufman*, L. R. 3 Q. B. D. 340; but *secus* in other cases, *re Jones, Eyre v. Cox*, 46 L. J. Chy. 316. The time for serving a statement of claim may be extended, even after expiration of time for delivery and where the statute would otherwise extinguish the right, *Canadian Oil Works v. Hay, W.* (1878) 107. This rule does not empower the Judge before whom an action was tried to grant an application as to costs which, by Ord. L., r. 1, if made to the Judge must be made at the trial, *Baker v. Oakes*, L. R. 2 Q. B. D. 171; see also *Welply v. Buhl, W. N.* (1878) p. 6; *Whistler v. Hancock, Ib.*, and see notes to O. L., r. 1. The Court or a Judge has power to enlarge the time limited by an order of the Master for doing an act, even after the expiration of the time so limited and a lapse of the four days for appealing, where the justice of the case requires it, *Burke v. Rooney*, L. R. 4 C. P. D. 226; and see *Gibbons v. The London Financial Association*, L. R. 4 C. P. D. 263. An application for leave to join another action with an action for recovery of land, must be made before the writ is issued, and this rule does not apply to such a case so as to enable the Court to extend the time for making such an application, *re Pilcher, Pilcher v. Hinds*, L. R. 11 Ch. D. 905.

The Court has power to extend the time for making an indorsement on a writ of the date of service, *Hastings v. Hurley*, L. R. 16 Ch. D. 734.

*Slip of Solicitor*.—See cases collected in notes to sec. 38 of the Act; and *Collins v. The Vestry of Paddington*, 49 L. J. C. L. 612.

For form of order enlarging time, see Forms, No. 114.

#### 463.

10. The costs of an application to extend the time for taking any proceeding shall, in the absence of an order by the Court or a Judge directing by whom they are to be paid, be in the discretion of the taxing master.

See Eng. R. Sup. C., April, 1880, r. 65.

At law a second application for time to plead might be allowed, see *Tarif of Costs*.



## ORDER LIII.

## AFFIDAVITS.

## 464.

O. LIII.  
R. 1.

1. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. Every affidavit shall be written or printed. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

See Eng. R. Sup. C., April, 1880, r. 12; G. O. Chy. Nos. 68, 258; Reg. Gen. T. T. 1856, No. 112, Ont.

Every affidavit should be intituled in the cause or matter in which it is made, and contain the true place of residence, description, and addition of the deponent, and great care should be taken that the names of parties are accurately set forth, *Solomon v. Stalman*, 4 Beav. 243; *May v. Prinsep*, 11 Jur. 1032; but see *Haws v. Bamford*, 9 Sim. 653; *Pearson v. Wilcox*, 10 Ha. app. 35.

Affidavits sworn abroad in the third person received as evidence, *re Husband*, 12 L. T. N. S. 303; *Dryden v. Frost*, 8 Sim. 380; and trifling irregularities have been overlooked, see *Gates v. Buckland*, 13 W. R. 67; *Mack v. Ward*, 10 Ha. app. 1; but the signature cannot be dispensed with, *Anderson v. Stather*, 9 Jur. 1085; nor the words "make oath," *Phillips v. Prentice*, 2 Ha. 542; *re Newton*, 2 D. F. & J. 3.

## 465.

2. Every affidavit shall state the description and true place of abode of the deponent, and shall be signed by him.

See Eng. R. Sup. C., April, 1880; Reg. Gen. T. T. 1856, No. 109, Ont.

As to additions which have been held sufficient, see *Harrison's C. L. P. A.* (2 ed.) 678. It has been held that parties to the cause may describe themselves as the above named plaintiff or defendant, without specifying any residence, addition, or other description, *Crockett v. Bishton*, 2 Mad. 446.

## 466.

3. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

See Eng. R. Sup. C., April, 1880, r. 14; Reg. Gen. T. T. 1856, No. 110, Ont.

467.

4. There shall be appended to or indorsed upon every affidavit a note shewing on whose behalf it is filed. **O. LIII. R. 4.**

See Eng. R. Sup. C., April, 1880, r. 15.

468.

5. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall without leave of the Court or a Judge be read or made use of in any matter pending in Court unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit; nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are rewritten, and signed or initialed in the margin of the affidavit by the officer taking it.

See Eng. R. Sup. C., April, 1880, r. 16; Reg. Gen. T. T. 1856, No. 111, Ont.; G. O. Chy. No. 131.

A line drawn through words, though leaving them perfectly legible, is an erasure, *Williams v. Clough*, 1 A. & E. 376.

469.

6. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his or her signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent.

See Eng. R. Sup. C., April, 1880, r. 17; Reg. Gen. T. T. 1856, No. 113, Ont.

The form of the jurat in such case may be as follows:—Sworn before me at the of in the County of this day of 18, having been first read over in my presence to the said who seemed perfectly to understand the same and who made signature thereto in my presence.

470.

7. In cases in which by the present practice an original affidavit is allowed to be used, it shall before it is used be stamped with a proper filing stamp, and shall at the time when it is used, be delivered to and left with the proper officer in Court or in Chambers. An office copy of an affidavit may in all cases be used, the original affidavit having been previously filed in the proper office, and the copy duly authenticated with the seal of that office.

See Eng. R. Sup. C., April, 1880, r. 18.

## ORDER LIV.

## DIVISIONAL AND OTHER COURTS.

## 471.

O. LIV.  
R. 1.

1. The following proceedings and matters shall be heard and determined before the Divisional Courts; but nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein, heretofore taken before a single Judge to be taken before a Divisional Court:

See Eng. R. Sup. C., Dec. 1876, r. 8.

Appeals from orders of a Judge in Chambers.

Proceedings directed by any Statute to be taken before the Court, and in which the decision of the Court is final.

Cases of Habeas Corpus, in which a Judge directs that a rule nisi for the writ, or the writ, be made returnable before a Divisional Court.

Other cases where all parties agree that the same be heard before a Divisional Court.

Applications for new trials in the said Divisions where the action has been tried with a jury.

## 472.

2. Bills of exceptions and proceedings in error shall be abolished.

See Eng. R. Sup. C., O. LVIII., r. 1.

## ORDER LV.

## EFFECT OF NON-COMPLIANCE AND ERRORS.

## 473.

O. LV.  
R. 1.

1. Non-compliance with any of these Rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt

with in such manner and upon such terms as the Court or **O. LV.**  
Judge shall think fit. **R. 1.**

See Eng. R. Sup. C., O. LIX.

"Court or a Judge"—See notes to O. IV., r. 1 (a).

#### 474.

2. The Court or a Judge may at any time, and on such terms as to costs or otherwise as to the Court or Judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case.

See Eng. R. Sup. C., April, 1880, r. 44; R. S. O., c. 49, ss. 7, 8; c. 50, s. 270.

See also as to amendments, O. XII., rr. 2, 15; O. XXIII., r. 1.

### ORDER LVI.

#### ACCOUNTANT'S OFFICE.

#### 475.

1. The Suitors' Accounts in the Queen's Bench, Common **O. LVI.**  
Pleas, and Chancery, shall be consolidated, and shall be in charge **R. 1.**  
of an officer to be called the Accountant of the Supreme Court.

#### 476.

2. Section 121 of the Common Law Procedure Act shall apply to the said accounts, and shall be read as if the words "Accountant of the Supreme Court" were substituted for the word "clerk" wherever the word "clerk" occurs in the said section.

#### 477.

3. Money is to be paid out of Court upon the cheque of the Accountant, countersigned by any of the following officers, viz.: one of the Clerks of the Crown and Pleas or the Registrar.

See R. S. O., c. 50, s. 121; G. O. Chy. No. 627.

"The Registrar."—This cannot be the Registrar of the Court of Chancery, for by rule 5 of this Order he is to be the Accountant of the Supreme Court, and yet there is no other officer known by that title.

## 478.

O. LVII.  
R. 4.

4. Every cheque is to be initialed by the chief Clerk in the Accountant's office before the same is presented for the signature of the Accountant or other officer.

See G. O. Chy. Nos. 352, 372, 627.

## 479.

5. The Registrar of the Court of Chancery shall act as, and shall be, Accountant of the Supreme Court until and unless some other person is appointed Accountant of the Supreme Court.

## ORDER LVII.

## SITTINGS AND VACATIONS.

## 480.

O. LVII.  
R. 1.

1. The sittings of the High Court of Justice shall be three in every year, viz., the Michaelmas sittings, the Hilary sittings, and the Easter sittings;

(a) The Michaelmas sittings shall begin on the third Monday in November, and end on the Saturday of the second week thereafter; the Hilary sittings shall begin on the first Monday in February and end on the Saturday of the following week; the Easter sittings shall begin on the third Monday in May and end on the Saturday of the second week thereafter

See Eng. R. Sup. C., O. LXI, r. 1; R. S. O., c. 39, s. 11.

(b) In case it appears to the Judges of the said Court, or a majority of them, that the number of days so provided for holding any sittings is not required, or is insufficient, for the due despatch of the business to be transacted by the Court in such sittings, such Judges may from time to time, by rule or order, shorten the period for holding the sittings to such period, not less than two weeks, or increase the length of the same to any period, as the case may require;

See R. S. O., c. 39, s. 12.

(c) The preceding provisions of this Order are not to apply to the Chancery Division except when the Judges thereof shall

be of opinion that the business of the said Division is such as to render the said provisions necessary or convenient for the due despatch of business, and shall give notice to that effect; O. LVIII.  
R. 1.

(d) Divisional Courts of the High Court are to sit at such further or other times as may be directed by the High Court or as may be necessary for the due despatch of business.

#### 481.

2. One or more of the Judges of the High Court shall be selected at the commencement of each Long Vacation, for the hearing in Toronto during vacation of all such applications as may require to be immediately or promptly heard. Such Judge or Judges shall act as vacation Judge or Judges for one year from appointment. In the absence of arrangement between the Judges, the vacation Judge or Judges shall be the Judge or Judges last appointed (whether as Judge or Judges of the said High Court or of any Court whose jurisdiction is by the Act vested in the said High Court) who have not already served as vacation Judges of any such Court; and if there shall not be any Judge or Judges for the time being of the said High Court who shall not have so served, then the vacation Judge or Judges shall be the Judge or Judges (if any) who has or have not so served and the senior Judge or Judges who has or have so served once only according to seniority of appointment whether in the said High Court or such other Court as aforesaid.

See Eng. R. Sup. C., Feb. 1876, r. 9.

By sec. 20 of the Act, the Lieutenant-Governor in Council may from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, make, revoke, or modify orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said Courts respectively; and any order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act; and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act.

#### 482.

3. The vacation Judges may sit either separately, or together as a Divisional Court, as occasion shall require, and may hear and dispose of all actions, matters, and other business to which-ever Division the same may be assigned. No order made by a vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or the Judge who



**O. LVII.  
R. 3.**

made the order. Any other Judge of the High Court may sit in vacation for any vacation Judge.

See Eng. R. Sup. C., O. LXI., r. 6.

As to what is vacation business, see *re* Wigan Junction Railways Act, L. R. 10 Ch. 541.

Where an application ought to be made before a Court which has risen any Judge who is sitting may hear it, *Price v. Gardner*, 1 Jur. N. S. 975. The jurisdiction of the vacation Judge to hear applications in causes pending in any of the Courts commences when that Court rises for the vacation, though it may have risen before the time provided for the commencement of the vacation, *Francis v. Browne*, 10 W. R. 811; *Holloway v. Phillips*, 22 L. J. N. S. Chy. 1091; and see *Bean v. Griffith*, 1 Jur. N. S. 1045.

#### 483.

4. The vacation Judges of the High Court may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any Division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation.

See Eng. R. Sup. C., O. LXI., r. 7.

As to proceedings to be taken before a Divisional Court, see O. LIV.

### ORDER LVIII.

#### EXCEPTIONS FROM THE RULES.

#### 484.

**O. LVIII.  
R. 1.**

Nothing in these Rules shall be construed as intended to affect the practice or procedure in criminal proceedings, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions.

See Eng. R. Sup. C., O. LXII.; R. S. O., c. 39, s. 4.

### ORDER LIX.

#### FORMS.

#### 485.

**O. LIX.  
R. 1.**

The forms contained in the Appendices hereto are to be used with such variations or modifications as circumstances may require.

See Eng. R. Sup. C., April, 1880, r. 52.

## ORDER LX.

## COUNTY COURTS.

## 486.

1. The County Court terms are abolished. There shall be **O. LX.**  
sittings of the said Court at and for the same periods as the **R. 1.**  
said terms.

## 487.

2. The sittings of the County Courts now required to be held on the first Monday in April and October in each year, for disposing of cases without the intervention of a jury, shall after the passing of this Act commence on the first Tuesday instead of the first Monday in each of the said months.

See R. S. O., c. 43, s. 4.

## 488.

3. Subject to Rules of Court, the Judges of the County Court shall also have power to sit and act at any time for the transaction of any part of the business of such courts, or for the discharge of any duty which by any statute or otherwise is required to be discharged out of or during term.

## 489.

4. In all actions, suits or other proceedings brought in any County or Division Court in Ontario, in which the plaintiff fails to recover judgment by reason of such Court having no jurisdiction over the subject matter thereof, the said County Court, or the Judge presiding in the said Division Court, as the case may be, shall have jurisdiction over the costs of such action, suit or other proceeding, and may order by and to whom the same shall be paid, and the recovery of the costs so ordered to be paid may be enforced by the same remedies as the costs in actions, suits or proceedings within the proper competence of the said Courts respectively are recoverable.

## 490.

5. Subject to the provisions of this Act, and to Rules of Court, the pleadings, practice and procedure for the time being of the High Court of Justice shall apply and extend to the County Courts, wherever the present pleadings, practice and procedure of the County Courts correspond with those of the Superior Courts of Law.

O. XXXI., r. 11, is expressly made applicable to the County Courts.

## ORDER LXI.

## INTERPRETATION.

## 491.

O. LXI.  
R. 1.

1. A "Judge" in the preceding Orders means a Judge of the Supreme Court, or a Judge having the authority for the time being of a Judge of the High Court, unless there is something in the context indicating a different meaning.

## 492.

2. Any Rule of the several Orders in this schedule may be cited by the marginal number of the Rule, or by the number of the Order, and of the Rule as it stands in such Order.

"A Judge."—See notes to O. IV., r. 1 (a).

## ORDER LXII.

## PENDING BUSINESS.

## 493.

O. LXII.  
R. 1.

1. With respect to pending business in the Queen's Bench and Common Pleas Divisions, the procedure is to be as follows:—(1) Where no declaration has been delivered, the action shall be continued according to the ordinary course of the High Court of Justice, as if it had been commenced in that Court. (2) In all other cases the action shall be continued up to the close of the pleadings according to the practice of the Court in which it was brought, and afterwards according to the provisions of the Act; subject, however, to an order, at the instance of either party, to proceed at any stage according to the provisions of the Act.

## 494.

2. With respect to pending business in the Court of Chancery, subject to any special order which may be made in any cause, matter or proceeding pending at the commencement of the Act, the procedure is to be as follows:—All causes, matters, and proceedings, except causes in which neither notice of motion for a decree has been served, nor replication been filed,

before the said time shall, so far as relates to the form and manner of procedure, be continued and concluded in the same manner as they would have been in the Court of Chancery; O. LXII.  
R. 9.

(a) All such pending causes in which, up to the commencement of the Act, no notice of motion for a decree has been served or replication filed, shall be continued in the same manner as they would have been continued in the Court of Chancery up to the time at which such notice of motion or replication could have been served or filed, and shall from that period be continued according to the ordinary course of the High Court or Justice;

See notice of Nov. 2, 1875, W. N. (1875), pt. II., p. 469; notice of Nov. 3, 1875, W. N. (1875), pt. II., p. 468.

See notes to s. 11 of the Act.

Where no petition of appeal from a decree has been presented before the Judicature Act came into operation, an appellant must proceed under the new practice, *Bartlam v. Yates*, L. R. 1 Ch. D. 13.

Where a suit in Chancery was brought to an issue on replication, filed and heard under the old practice, it was held that the appeal must be regulated by the new practice, and the bill having been dismissed, the time for appealing was calculated from the pronouncing of the decree, *International Financial Society v. City of Moscow Gas Co., City of Moscow Gas Co. v. International Financial Society*, L. R. 7 Ch. D. 241.

Default in answering in a pending suit is not "default in delivering a defence," so as to entitle the plaintiff to set down the action on motion for judgment, *Culley v. Buttifant*, L. R. 1 Ch. D. 84.

Where a defendant in a pending suit had failed to enter an appearance or put in an answer:—Held, that the cause should proceed for all purposes as if it were the plaintiff's statement of claim, so that the plaintiff might proceed under O. XIII., r. 9, and O. XXIX., r. 10 (neither of which is in force, however, in Ontario), (*Culley v. Buttifant* distinguished), *Provident Permanent Building Society v. Greenhill*, L. R. 1 Ch. D. 624.

(b) Any party to a pending cause may apply in chambers that, for special reasons, a direction may be given for continuing such cause according to the ordinary course of the High Court or Justice.

THE UNIVERSITY OF CHICAGO  
LIBRARY  
1114  
1977

---

---

PART II.

---

APPENDICES TO THE FOREGOING RULES.

---

---



1000  
900  
800  
700  
600  
500  
400  
300  
200  
100  
0

1000  
900  
800  
700  
600  
500  
400  
300  
200  
100  
0

1000  
900  
800  
700  
600  
500  
400  
300  
200  
100  
0

# APPENDICES TO THE FOREGOING RULES.

## APPENDIX (A).

### PART I.

#### FORMS OF WRITS OF SUMMONS, AND NOTICE IN LIEU OF SUMMONS.

##### No. 1.

*General Form of Writ of Summons.— O. II.*

In the High Court of Justice.

—Divisi<sup>n</sup>.

Between *A.B.* Plaintiff,

and

*C.D.* and *E.F.* Defendants.

VICTORIA, by the Grace of God, &c.

To *C.D.* of in the county of and *E.F.* of

We command you, That within ten days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of *A.B.*; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, the Honourable

President, &c.

*Memorandum to be subscribed on the writ.*

N.B.—This writ is to be served within 12 calendar months from the date thereof, or if renewed, within 12 calendar months from the date of such renewal, including the day of such date, and not afterwards.

The defendant [or defendants] may appear hereto by entering an appearance [or appearances] either personally or by solicitor at the [ ] office at

*Indorsements to be made on the writ.*

The plaintiff's claim is for, &c.

*Where the writ is to be specially indorsed add:—*The following are the particulars:—(*Giving them. See Part II. post.*)

This writ was issued by *E.F.*, of solicitor for the said plaintiff, who resides at , or, this writ was issued by the plaintiff in person who resides at [mention the city, town, or township, and also the name of the street and number of the house of the plaintiff's residence, if any, or in case of a township, the number of the lot and concession.]

*Indorsement to be made on the writ after service thereof.*

This writ was served by X.Y. on C.D. [the defendant or one of the defendants], on Monday, the      day of      , 18      .  
(Signed) X.Y.

## No. 2.

*Writ for service out of Ontario or where notice in lieu of service is to be given out of Ontario.—O. II.*

In the High Court of Justice.  
— Division.

Between A.B., Plaintiff,  
and  
C.D. and E.F. Defendants.

VICTORIA, by the grace of God, &c.

To C. D., of

We command you C. D., that within [here insert the number of days directed by Order II., or as the case may be] after the service, on you, of this writ and of the plaintiff's statement of claim delivered herewith, [or notice of this writ as the case may be], inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of A.B., and your defence thereto, if any, to be delivered; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, the Honourable

President, &c.

*Memorandum and indorsements as in Form No. 1,*

*Indorsement to be made on the writ.*

N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of Ontario. When the defendant to be served is not a British subject, and is not in British dominions notice of the writ, and not the writ itself, is to be served upon him.

*Indorsement to be made on the writ after service thereof:*

This notice was served by X.Y., on G. H., (the defendant or one of the defendants) on      the      day of      18      .  
Indorsed the      day of      18      .  
(Signed)  
(Address)

## No. 3.

*Notice of writ, in lieu of service, to be given out of Ontario.—O. II., r. 4.*

In the High Court of Justice.  
— Division.

Between A.B. Plaintiff,  
and  
C.D., E.F., and G.H., Defendants.

To G.H., of

Take notice that A.B., of      has commenced  
an action against you, G.H., in the      Division of Her Majesty's High  
Court of Justice in Ontario, by writ of that Court, dated the

day of , A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within [ ] days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action, and your defence thereto, if any, to be delivered ; and in default of your so doing, the said *A.B.*, may proceed therein, and judgment may be given, in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [ ] office at

Dated, &c.

(Signed) *A.B.*, of &c.

*X.Y.*, of &c.

Solicitor for *A.B.*

N.B.—This notice is to be used when the person to be served is not a British subject, and is not in British dominions.

*Indorsement to be made on the writ after service thereof :*

This notice was served by *X.Y.*, on *G.H.*, (the defendant or one of the defendants) on the day of 18

Indorsed the day of 18  
(Signed)  
(Address)

## PART II.

### INDORSEMENTS ON WRITS OF SUMMONS.

#### No. 4.

#### SECTION I.

*Money Claims where no Special Indorsement under Order III., Rule 4.—*

*See O. II., r. 1 ; O. III., rr. 1, 2.*

The plaintiff's claim is \$ for the price of goods sold. Goods sold.

*This Form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.*

The plaintiff's claim is \$ for money lent [and interest]. Money lent.  
The plaintiff's claim is \$ whereof \$ is for the price of goods sold, and \$ for money lent, and \$ for interest. Several demands.  
The plaintiff's claim is \$ for arrears of rent. Rent.  
The plaintiff's claim is \$ for arrears of salary as a clerk [*or as the case may be*]. Salary, &c.

The plaintiff's claim is \$ for interest upon money lent. Interest.  
The plaintiff's claim is \$ for a general average contribution. General average.  
The plaintiff's claim is \$ for freight and demurrage. Freight, &c.

The plaintiff's claim is \$ for lighterage. Lighters.  
The plaintiff's claim is \$ for market tolls and stallage. Market tolls.  
The plaintiff's claim is \$ for penalties under the Statute Vic- Penalties.

toria, chap. [ . . . ]  
The plaintiff's claim is \$ for money deposited with the defendant Banker's balance.  
as a banker.

The plaintiff's claim is \$ for fees for work done [and \$ money Fees, &c., as expended] as a solicitor. solicitors.

Commission.	The plaintiff's claim is \$ <i>auctioneer, broker, &amp;c.</i>	for commission as [ <i>state character as</i> ]
Medical attendance, &c.	The plaintiff's claim is \$	for medical attendance.
Return of premium.	The plaintiff's claim is \$ policies of insurance.	for a return of premiums paid upon
Warehouse rent.	The plaintiff's claim is \$	for the warehousing of goods.
Carriage of goods.	The plaintiff's claim is \$	for the carriage of goods by railway.
Use and occupation of house.	The plaintiff's claim is \$	for the use and occupation of a house.
Hire of goods.	The plaintiff's claim is \$	for the hire of [ <i>furniture</i> ].
Work done.	The plaintiff's claim is \$	for work done as surveyor.
Board and lodging.	The plaintiff's claim is \$	for board and lodging.
Schooling.	The plaintiff's claim is \$ X. Y.	for the board, lodging and tuition of
Money received.	The plaintiff's claim is \$ solicitor [ <i>or factor, or collector, or, &amp;c.</i> ] of the plaintiff.	for money received by the defendant as
Fees of office.	The plaintiff's claim is \$ colour of the office of	for fees received by the defendant under
Money overpaid.	The plaintiff's claim is \$ the carriage of goods by railway.	for a return of money overcharged for
	The plaintiff's claim is \$ the defendant as	for a return of fees overcharged by the
Return of money by stakeholder.	The plaintiff's claim is \$ the defendant as stakeholder.	for a return of money deposited with
Money won from stakeholder.	The plaintiff's claim is \$	for money entrusted to the defendant as stakeholder, and become payable to plaintiff.
Money entrusted to agent.	The plaintiff's claim is \$	for a return of money entrusted to the defendant as agent to the plaintiff.
Money obtained by fraud.	The plaintiff's claim is \$ plaintiff by fraud.	for a return of money obtained from the
Money paid by mistake.	The plaintiff's claim is \$ defendant by mistake.	for a return of money paid to the de-
Money paid for consideration which has failed.	The plaintiff's claim is \$ defendant for [ <i>work to be done, left undone ; or a bill to be taken up, not taken up &amp;c.</i> ]	for a return of money paid to the de-
	The plaintiff's claim is \$ upon shares to be allotted.	for a return of money paid as a deposit
Money paid by surety for defendant.	The plaintiff's claim is \$ surety.	for money paid for the defendant as his
Rent paid.	The plaintiff's claim is \$ defendant.	for money paid for rent due by the de-
Money paid on accommodation bill.	The plaintiff's claim is \$ indorsed] for the defendant's accommodation.	upon a bill of exchange accepted [ <i>or</i>
Contribution by surety.	The plaintiff's claim is \$ paid by the plaintiff as surety.	for a contribution in respect of money
By co-debtor.	The plaintiff's claim is \$ debt of the plaintiff and the defendant, paid by the plaintiff.	for a contribution in respect of a joint

The plaintiff's claim is \$	for money paid for calls upon shares,	Money paid for calls.
against which the defendant was bound to indemnify the plaintiff.		
The plaintiff's claim is \$	for money payable under an award.	Money payable under award.
The plaintiff's claim is \$	upon a policy of insurance upon the life	Life policy.
of X. Y., deceased.		
The plaintiff's claim is \$	upon a bond to secure payment of	Money bond.
\$1,000, and interest.		
The plaintiff's claim is \$	upon a judgment of the	Court, Foreign judgment.
in the Province of Quebec.		
The plaintiff's claim is \$	upon a cheque drawn by the defendant.	Bill of exchange, &c.
The plaintiff's claim is \$	upon a bill of exchange accepted [or	
drawn or indorsed] by the defendant.		
The plaintiff's claim is \$	upon a promissory note made [or in-	
dorsed] by the defendant.		
The plaintiff's claim is \$	against the defendant A.B. as acceptor,	
and against the defendant C.D. as drawer [or indorser] of a bill of exchange.		
The plaintiff's claim is \$	against the defendant as surety for the	Surety.
price of goods sold.		
The plaintiff's claim is \$	against the defendant A.B. as principal,	
and against the defendant C.D. as surety for the price of goods sold [or arrears of rent, or for money lent, or for money received by the defendant A.B., as traveller for the plaintiffs, or, &c.]		
The plaintiff's claim is \$	against the defendant as a <i>del credere</i>	<i>Del credere</i> agent.
agent for the price of goods sold [or as losses under a policy].		
The plaintiff's claim is \$	for calls upon shares.	Calls.

No. 5.

SECTION II.

*Indorsement for Costs, &c.*—O. III., r. 5.

[Add to the above Forms] and \$ for costs; and if the amount claimed be paid to the plaintiff or his solicitor within 8 days [or if the writ is to be served out of Ontario, or notice in lieu of service allowed, insert the time limited for appearance and defence] from the service hereof, further proceedings will be stayed.

No. 6.

SECTION III.

*Indorsements on Writs for Damages and other Claims.*—O. II., r. 1; O. III., rr. 1, 2.

The plaintiff's claim is for damages for breach of a contract to employ Agent, &c the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and \$ for arrears of wages].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.



- The plaintiff's claim is for damages for breach of duty as factor [*or, &c.*] of the plaintiff [and \$                      for money received as factor, &c.]
- The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of *X. Y.* to the defendant [*or plaintiff*].
- The plaintiff's claim is for damages for non-compliance with the award of *X. Y.*
- Arbitration.**
- Assault, &c.** The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution].
- By husband and wife.** The plaintiffs' claim is for damages for assault and false imprisonment of the plaintiff *C. D.*
- Solicitor.** The plaintiffs' claim is for damages for assault by the defendant *C. D.*
- Bailment.** The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.
- Pledge.** The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same].
- Hire.** The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire [*or a carriage lent*], [and for wrongfully, &c.]
- Banker.** The plaintiff's claim is for damages for wrongfully neglecting [*or refusing*] to pay the plaintiff's cheque.
- Bill.** The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.
- Bond.** The plaintiff's claim is upon a bond conditioned not to carry on the trade of a
- Carrier.** The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.
- The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.
- The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.
- The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.
- The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].
- Charter-party.**
- Damages for depriving of goods.** The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.
- Defamation.** The plaintiff's claim is for damages for libel.
- Distress.** The plaintiff's claim is for damages for slander.
- Replevin.** The plaintiff's claim is in replevin for goods wrongfully distrained.
- Wrongful distress.** The plaintiff's claim is for damages for improperly distraining.
- [*This form shall be sufficient whether the distress complained of be wrongful or excessive, or irregular, and whether the claim be for damages only, or for double value.*]
- Fishery.** The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.
- Fraud.** The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or a business, or shares, or, &c.*].
- The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*
- Guarantee.** The plaintiff's claim is for damages for breach of a contract of guarantee for *A. B.*
- The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain,

The plaintiff's claim is for a loss under a policy upon the ship "Royal Insurance Charter," and freight or cargo [or for return of premiums].

[This Form shall be sufficient whether the loss claimed be total or partial].

The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture. Fire insurance.

The plaintiff's claim is for damages for breach of a contract to insure a house. Landlord and tenant.

The plaintiff's claim is for damages for breach of contract to keep a house in repair.

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man. Medical man.

The plaintiff's claim is for damages for injury by the defendant's dog. Mischievous animal.

The plaintiff's claim is for damages for injury to the plaintiff [or, if by husband and wife, to the plaintiff C.D.] by the negligent driving of the defendant or his servants. Negligence.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

The plaintiff's claim is as executor of A.B. deceased, for damages for the death of the said A.B., from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants. Lord Campbell's Act.

The plaintiff's claim is for damages for breach of promise of marriage. Promise of marriage.

The plaintiff's claim is for damages for the seduction of the plaintiff's daughter. Seduction.

The plaintiff's claim is for damages for breach of contract to accept and pay for goods. Sale of goods.

The plaintiff's claim is for damages for non-delivery [or short delivery or defective quality, or other breach of contract of sale] of cotton [or, &c.]

The plaintiff's claim is for damages for breach of warranty of a horse.

The plaintiff's claim is for damages for breach of a contract to sell [or purchase] land. Sale of land.

The plaintiff's claim is for damages for breach of contract to let [or take] a house.

The plaintiff's claim is for damages for breach of a contract to sell [or purchase] the lease, with goodwill, fixtures, and stock-in-trade of a public-house.

The plaintiff's claim is for damages for breach of covenant for title [or for quiet enjoyment, or, &c.] in a conveyance of land.

The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [or cutting his grass, or pulling down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river]. Trespass to land.

The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [or house or mine]. Support.

The plaintiff's claim is for damages for wrongfully obstructing a way [public highway or private way]. Way.

Watercourse,  
&c.

The plaintiff's claim is for damages for wrongfully diverting [or obstructing, or polluting, or diverting water from] a watercourse.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [or into the plaintiff's mine].

The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.

Pasture.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[This form shall be sufficient whatever the nature of the right to pasture be.]

Light.

The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.

Patent.

The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

Copyright.

The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

Trade mark.

The plaintiff's claim is for damages for wrongfully using [or imitating] the plaintiff's trade mark.

Work.

The plaintiff's claim is for damages for breach of a contract to build a ship [or to repair a house, &c.]

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.

Nuisance.

The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [or, &c.]

The plaintiff's claim is for damages from nuisance by noise from the defendant's works [or, &c.]

Innkeeper.

The plaintiff's claim is for damages for loss of the plaintiff's goods in the defendant's inn.

Claim for  
return of  
goods;  
damages.

The plaintiff's claim is for return of household furniture, or, &c., or their value, and for damages for detaining the same.

Ejectment.

The plaintiff's claim is to recover possession of a house, No.     in street, in the City of Ottawa; or of the N.E.  $\frac{1}{4}$  of lot 2, in the 3rd concession of the Township of     in the county of     .

To establish  
title and  
recover rents.

The plaintiff's claim is to establish his title to [here describe property], and to recover the rents thereof.

[The two previous forms may be combined.]

Dower.

The plaintiff's claim is for dower out of lot number     (or describing the property otherwise with reasonable certainty). And take notice that the plaintiff claims damages for the detention of her dower from the day of     .

Mandamus.

Add to indorsement if a mandamus is claimed

And for a mandamus:

Add to indorsement if an injunction is claimed.

Injunction.

And for an injunction.

Add to Indorsement where Claim is to land, or to establish title, or both:

Mesne profits.  
Arrears of  
rent.  
Breach of  
covenant.

And for mesne profits.

And for an account of rents or arrears of rent.

And for breach of covenant for [repairs].

No. 7.

SECTION IV.

*Money Claims—Special Indorsements under Order III. Rule 4.*

1. The plaintiff's claim is for the price of goods sold. The following are the particulars :—

1879—31st December.—	
Balance of account for butcher's meat to this date . . . . .	\$142
1880—1st January to 31st of March.—	
Butcher's meat supplied . . . . .	297
	<hr/>
	\$439
1880—1st February.—Paid . . . . .	180
	<hr/>
Balance due . . . . .	\$259

2. The plaintiff's claim is against the defendant *A.B.* as principal, and against the defendant *C.D.* as surety, for the price of goods sold to *A.B.* The following are the particulars :—

1881—2nd February. Guarantee by *C.D.* of the price of woollen goods to be supplied to *A.B.*

2nd February—To goods . . . . .	\$225
3rd March—To goods . . . . .	151
17th March—To Goods . . . . .	27
5th April—To Goods . . . . .	65
	<hr/>
	\$468

3. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars :—

Promissory note for \$1,000, dated 1st January 1879, made by defendant, payable 4 months after date.

Principal . . . . .	\$1,000
Interest . . . . .	

4. The plaintiff's claim is against the defendant *A.B.* as acceptor, and against the defendant *C.D.* as drawer, of a bill of exchange. The following are the particulars :—

Bill of exchange for \$2,000, dated 1st January, 1880, drawn by defendant *C.D.* upon and accepted by defendant *A.B.*, payable 3 months after date.

Principal . . . . .	\$2,000
Interest . . . . .	

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars :—

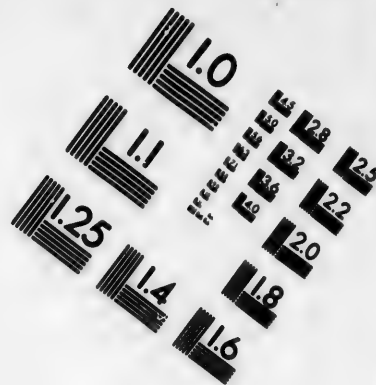
Bond dated 1st January, 1879. Condition for payment of \$500 on the 26th December, 1879.

Principal due . . . . .	\$500
Interest . . . . .	

6. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars :—

Deed dated . . . . . covenant to pay \$3,000 and interest.

Principal due . . . . .	\$800
Interest . . . . .	



1.0

1.1

1.25

1.4

1.6

1.8

2.0

2.2

2.5

2.8

3.2

3.6

4.0

4.5

5.0

5.6

6.3

7.1

8.0

9.0

10

11

12.5

14

16

18

20

22.5

25

28

32

36

40

45

50

56

63

71

80

90

100

112

125

140

160

180

200

225

250

280

320

360

400

450

500

560

630

710

800

900

1000

1120

1250

1400

1600

1800

2000

2250

2500

2800

3200

3600

4000

4500

5000

5600

6300

7100

8000

9000

10000

11200

12500

14000

16000

18000

20000

22500

25000

28000

32000

36000

40000

45000

50000

56000

63000

71000

80000

90000

100000

112000

125000

140000

160000

180000

200000

225000

250000

280000

320000

360000

400000

450000

500000

560000

630000

710000

800000

900000

1000000

1120000

1250000

1400000

1600000

1800000

2000000

2250000

2500000

2800000

3200000

3600000

4000000

4500000

5000000

5600000

6300000

7100000

8000000

9000000

10000000

11200000

12500000

14000000

16000000

18000000

20000000

22500000

25000000

28000000

32000000

36000000

40000000

45000000

50000000

56000000

63000000

71000000

80000000

90000000

100000000

112000000

125000000

140000000

160000000

180000000

200000000

225000000

250000000

280000000

320000000

360000000

400000000

450000000

500000000

560000000

630000000

710000000

800000000

900000000

1000000000

1120000000

1250000000

1400000000

1600000000

1800000000

2000000000

2250000000

2500000000

2800000000

3200000000

3600000000

4000000000

4500000000

5000000000

5600000000

6300000000

7100000000

8000000000

9000000000

10000000000

11200000000

12500000000

14000000000

16000000000

18000000000

20000000000

22500000000

25000000000

28000000000

32000000000

36000000000

40000000000

45000000000

50000000000

56000000000

63000000000

71000000000

80000000000

90000000000

100000000000

112000000000

125000000000

140000000000

160000000000

180000000000

200000000000

225000000000

250000000000

280000000000

320000000000

360000000000

400000000000

450000000000

500000000000

560000000000

630000000000

710000000000

800000000000

900000000000

1000000000000

1120000000000

1250000000000

1400000000000

1600000000000

1800000000000

2000000000000

2250000000000

2500000000000

2800000000000

3200000000000

3600000000000

4000000000000

4500000000000

5000000000000

5600000000000

6300000000000

7100000000000

8000000000000

9000000000000

10000000000000

11200000000000

12500000000000

14000000000000

16000000000000

18000000000000

20000000000000

22500000000000

25000000000000

28000000000000

32000000000000

36000000000000

40000000000000

45000000000000

50000000000000

56000000000000

63000000000000

71000000000000

80000000000000

90000000000000

100000000000000

112000000000000

125000000000000

140000000000000

160000000000000

180000000000000

200000000000000

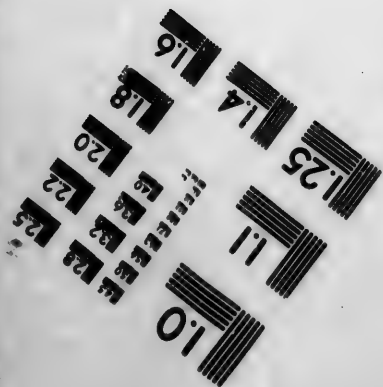
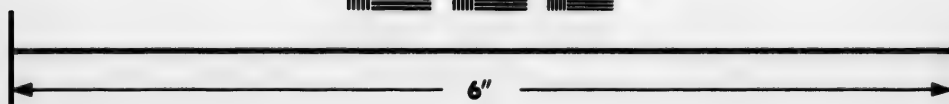
225000000000000

250000000000000

280000000000000

320000000000000

360



# Photographic Sciences Corporation

**23 WEST MAIN STREET  
WEBSTER, N.Y. 14590  
(716) 872-4503**

2.8  
2.5  
2.2  
2.0  
1.8  
1.6

1.0  
1.1  
1.2  
1.3  
1.4  
1.5  
1.6  
1.7  
1.8  
1.9  
2.0

## No. 8.

## SECTION V.

*Indorsements of Character of Parties.—O. III., r. 3.*

Executor.	The plaintiff's claim is as executor [or administrator] of <i>C. D.</i> , deceased, for, &c. The plaintiff's claim is against the defendant <i>A. B.</i> , as executor [or, &c.] of <i>C. D.</i> , deceased, for, &c. The plaintiff's claim is against the defendant <i>A. B.</i> , as executor of <i>X. Y.</i> , deceased, and against the defendant <i>C. D.</i> , in his personal capacity, for, &c.
Against executrix.	The claim of the plaintiff is against the defendant as executrix of <i>C. D.</i> , deceased, for
Assignee in insolvency.	The plaintiff's claim is as assignee in insolvency of <i>A. B.</i> , for The plaintiff's claim is against the defendant as assignee in insolvency of <i>A. B.</i> , for
Trustees.	The plaintiff's claim is as [or the plaintiff's claim is against the defendant as] trustee under the will of <i>A. B.</i> [or under the settlement upon the marriage of <i>A. B.</i> and <i>X. Y.</i> , his wife].
Heir and devisee.	The plaintiff's claim is against the defendant as heir-at-law of <i>A. B.</i> , deceased. The plaintiff's claim is against the defendant <i>C. D.</i> , as heir-at-law, and against the defendant <i>E. F.</i> , as devisee of lands under the will of <i>A. B.</i>
Qui tam action.	The plaintiff's claim is as well for the Queen as for himself, for

## No 9.

## SECTION VI.

*Indorsements in Matters which formerly belonged to the exclusive jurisdiction of equity.—O. II., r. 1 ; O. III., rr. 1, 2, 6, 7.*(a) *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of *X. Y.*, of deceased, to have the [real and] personal estate of the said *X. Y.*, administered. The defendant *C. D.* is sued as the administrator of the said *X. Y.* [and the defendants *E. F.* and *G. H.* as his co-heirs-at-law].

(b) *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, of *X. Y.* deceased, to have the [real and] personal estate of the said *X. Y.* administered. The defendant *C. D.* is sued as the executor of the said *X. Y.* [and the defendants *E. F.* and *G. H.* as his devisees].

(c) *Partnership account.*

The plaintiff's claim is to have an account taken of the partnership



dealings between the plaintiff and defendant [under articles of partnership dated the                      day of                      ], and to have the affairs of the partnership wound up.

(d) *By Mortgagee for sale and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the                      day of                      made between                      [or by deposit of title deeds], and that the mortgage may be enforced by sale, and payment to the plaintiff by the defendant personally of any balance. *(If order for immediate payment is wanted add)*, And take notice further that the plaintiff claims to be entitled forthwith to execution against the goods and lands of you *(naming the defendant against whom this order is claimed)* to recover payment of the amount due by you.

*(If order for immediate possession is wanted add)*, And take notice further, that the plaintiff claims to be entitled to an order for the immediate delivery of the mortgaged premises to him.

(e) *By Mortgagee for foreclosure and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the                      day of                      , made between                      *(or by deposit of title deeds)*, and that the mortgage may be enforced by foreclosure.

*(If order for immediate payment is wanted add)*, And take notice further that the plaintiff claims to be entitled forthwith to execution against the goods and lands of you *(naming the defendant against whom this order is claimed)* to recover payment of the amount due by you.

*(If order for immediate possession is wanted add)*, And take notice further that the plaintiff claims to be entitled to the immediate possession of the mortgaged premises.

*(At the end of the indorsement add)*, If you desire a sale of the mortgaged premises instead of a foreclosure, and do not intend to defend the action, you must within the time allowed for appearance, file in the office within named, a notice in writing, signed by yourself or your solicitor, to the following effect:—"I desire a sale of the mortgaged premises in the plaintiff's writ of summons mentioned, or a competent part thereof, instead of a foreclosure," and you must deposit the sum of \$80 to meet the expenses of such sale.

(f) *By Mortgagor for Redemption.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated                      and made between *[parties]*, and to redeem the property comprised therein.

(g) *Raising Portions.*

The plaintiff's claim is that the sum of \$                      , which by an indenture of settlement dated                      , was provided for the portions of the younger children of                      may be raised.

(h)

*Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture dated \_\_\_\_\_ and made between \_\_\_\_\_, carried into execution.

(i)

*Cancellation or Rectification.*

The plaintiff's claim is to have a deed dated \_\_\_\_\_ and made between [parties], set aside or rectified,

(j)

*Specific Performance.*

The plaintiff's claim is for specific performance of an agreement dated the \_\_\_\_\_ day of \_\_\_\_\_, for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at \_\_\_\_\_.

(k)

*Alimony.*

The plaintiff's claim is for alimony; and the plaintiff demands as interim alimony until the trial of the action the monthly (or weekly) sum of \$ \_\_\_\_\_ to be paid to her on the \_\_\_\_\_ day of each month (or week) at \_\_\_\_\_ and the interim costs to which she is entitled by the practice in that behalf.

NOTE.—Where the plaintiff desires to register a certificate of *lis pendens* the indorsement on the writ of summons may contain such short description of the property as may be necessary or proper for that purpose.

---

## APPENDIX (B).

## NOTICES, &amp;c.

## No. 10.

*Notice of Motion to Court.—O. XLVII.*In the High Court of Justice.  
— Division.

Between

and

Plaintiff,

Defendant.

Take notice, that the Court will be moved on behalf of      on      day  
the      day of      18 ,      at      o'clock in the forenoon, or so soon  
thereafter as counsel can be heard, that (*state the object of the intended  
application*).

Dated the      day of      18 .

(Signed)  
Solicitor for the

To

## No. 11.

*Notice of Motion in Chambers.—O. XLVIII.*

[Title, &amp;c.]

Take notice that a motion will be made on behalf of  
before the Master in Chambers (*or as the case may be*), at Osgoode Hall, in  
the City of Toronto, on      day the      day of      ,  
18 , at      o'clock in the      noon, or so soon thereafter as  
the motion can be heard, for an order for      time to, &c.,

For time.

or, that      be at liberty to sign final judgment in this action for the      For final judg-  
amount indorsed on the writ with interest, if any, and costs ;      ment under  
Order 10.

or, that the Plaintiff be at liberty to amend the writ of summons in this      To amend  
action by      writ.

or, that the      do furnish the said      with a      For particu-  
statement in writing, verified by affidavit, setting forth the names of the lars (Partner-  
persons constituting the members or co-partners of their firm, pursuant ship).  
to the Rules of the Supreme Court, Order 12, Rule 12.

or, for an account in writing of the particulars of the Plaintiff's claim in      For particu-  
this action (with dates and items, *or as the case may be*), and that unless lars (gen-  
such particulars be delivered in 4 days, all further proceedings be stayed erally).  
until the delivery thereof ;

For particulars (accident). or, for an account in writing of the particulars of the injuries and expenses mentioned in the Statement of Claim, together with the time and place of the accident, and the particular acts of negligence complained of, and that unless such particulars be delivered within days, all further proceedings be stayed until the delivery thereof ;

To discharge or vary order. or, that the order of in this action, dated the day of , 18 , be (discharged, or varied by, &c.), on the grounds disclosed in the affidavit of , filed in support of this application ;

To dismiss action. or, that this action be dismissed with costs to be taxed and paid to the Defendant by the Plaintiff for want of prosecution, the Plaintiff not having, &c. ;

For discovery of documents. or, that the answer within days, stating what documents are or have been in possession or power relating to the matters in question in this action ;

To inspect documents. or, that the be at liberty to inspect, and take copies of, or extracts from , and that in the meantime all further proceedings be stayed ;

To examine witness before trial. or, that a witness on behalf of the be examined forthwith before upon the usual terms ;

For Commission to examine witnesses. or, that the be at liberty to issue a commission for the examination of witnesses on behalf at , and that the trial of this action be stayed until the return of such commission upon the usual terms ;

To refer under section 47 of the Act. or, that the following question arising in this action, namely :— be referred for inquiry and report to under section 47 of the Judicature Act ;

To refer under section 48 of the Act. or, that the in this action be tried by under section 48 of the Judicature Act ;

For compulsory reference to Master. or, that (this action or the matters of account in this action or the following questions in this action being matters of account, namely, &c.) be referred to the certificate of one of the Masters of the Supreme Court of Judicature to award or certify ;

For examination of judgment debtor as to means. or, that the above-named judgment debtor be orally examined as to whether any and what debts are owing to him, and do attend for that purpose before the Master in Chambers (or as the case may be) at such time and place as he may appoint, and that the said judgment debtor produce his books, &c., before the said Master at the time of the examination ;

For trial of action in County Court. or, that this action be tried before the County Court of holden on

For interpleader order (by sheriff). or, that the plaintiff and the claimant appear and state the nature of their respective claims to the goods and chattels seized by the above-named sheriff under the writ of *fiery facias* issued in this action and maintain or relinquish the same and abide by such order as may be made herein, and that in the meantime all further proceedings be stayed.

## No. 12.

*Notice of application for Administration Order or respecting the guardianship of an infant.*—G. O. Chy., No. 561.

In the High Court,  
— Division.

Between A.B., plaintiff,  
and  
C.D., defendant.

To Mr. C. D.

Take notice that an application will be made to  
—, in Toronto, (or to  
— at his office in the city (or town) of, &c., as  
the case may be), on the — day of — at the hour of  
— o'clock in the forenoon, (or if opposed, then to a Judge in Chambers so  
soon thereafter as a Judge shall be sitting in Chambers, for an order for  
the administration of the estate, real and personal, of — by the  
Court, or for an order appointing — guardian of — an  
infant); and upon such application will be read the affidavits of  
this day filed.

Dated, &c.

X. Y., Solicitor for  
—

## No. 13.

*Notice of Entry of Appearance.*—O. VIII., r. 12.

In the High Court of Justice.  
— Division.

Between

and

Plaintiff,

Defendant.

Take notice, that — have this day entered an appearance at — for  
the defendant — to the writ of summons in this action.

The said defendant require [or do not require] delivery of a state-  
ment of claim.

Dated the — day of — 18 .

(Signed)

Solicitor for the defendant.

To  
—

## No. 14.

*Notice limiting defence.*—O. VIII., r. 17.

In the High Court of Justice.  
— Division.

Between A.B., plaintiff,  
and  
C.D., and E.F., defendants.

The defendant, *C.D.*, limits his defence to part only of the property mentioned in the writ in this action, that is to say, to the north-west quarter of the lot.

Yours, &c.,  
*G. H.*,

Solicitor for the said defendant *C.D.*

To  
\_\_\_\_\_

### No. 15.

*Notice disputing amount.*—O. VIII., r. 19.

In the High Court of Justice.

\_\_\_\_\_ Division.

Between

Plaintiff,

and

Defendant.

Take notice, that the defendant disputes the amount claimed by the plaintiff (*or* the defendant insists that the amount due to the plaintiff is \$ only; *or* the defendant insists that the amount due to the plaintiff is \$ for principal and \$ for interest, since the day of &c., and no more, *as the case may be.*)

(Signed)

Solicitor for the defendant.

To  
\_\_\_\_\_

### No. 16.

*Notice in lieu of Statement of Claim.*—O. XVII., r. 2.

In the High Court of Justice.

\_\_\_\_\_ Division.

Between *A.B.*, plaintiff,

and

*C.D.*, defendant.

The particulars of the plaintiff's claim herein, and of the relief and remedy to which he claims to be entitled, appear by the indorsement upon the writ of summons.

Dated, &c.

X. Y.,

Solicitor for Plaintiff.

### No. 17.

*Confession of Defence.*—O. XVI., r. 7.

In the High Court.

\_\_\_\_\_ Division.

Between *A.B.*, plaintiff,

and

*C. D.*, defendant.

The plaintiff confesses the defence stated in the \_\_\_\_\_ paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

Dated, &c.

X. Y.,

Solicitor for Plaintiff.

## No. 18.

*Notice by Defendant to Third Party.—O. XII., r. 20.*

Notice filed      day of

In the High Court,  
——— Division.Between A. B., plaintiff,  
and  
C. D., defendant.

To Mr. X. Y.

Take notice that this action has been brought by the plaintiff against the defendant [as surety for M. N., upon a bond conditioned for payment of \$10,000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are (his co-surety under the said bond, or, also surety for the said M. N., in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the      day of      , A.D.      ).

Or [as acceptor of a bill of exchange for \$2,500, dated the      day of      , A.D.      , drawn by you upon and accepted by the defendant and payable 3 months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.]

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant C. D., you must cause an appearance to be entered for you within 8 days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant C. D. and yourself to dispute the validity of the judgment in this action whether obtained by consent or otherwise.

Dated, &amp;c.

(Signed) E. T.

Or

X. Y.,

Solicitor for the defendant,  
E. T.

Appearance to be entered at

## No. 19.

*Indorsement on copy Defence and Counter-claim to be served on Third Party.—O. XVIII., r. 6.*

"To the within named X. Y.

Take notice that if you do not appear to the within counter-claim of the within-named C. D., within 8 days from the service of this

B



defence and counter-claim upon you, you will be liable to have judgment given against you in your absence.

Appearances are to be entered at

### No. 20.

*Indorsement on Order adding or changing parties.*—O. XLIV., r. 6.

Take notice, that if you desire to discharge this order you must apply to the Court for that purpose within 12 days after the service hereof upon you. The original statement of claim in this cause is filed in the office of the at  
(and if the service is after a judgment directing a reference to a Master or other officer, add) and the reference under the judgment in this matter is being prosecuted in the office of the at

### No. 21.

*Notice of payment into Court.*—O. XXVI., r. 2.

In the High Court of Justice,

Division.

*A. B. v. C. D.*

Take notice that the defendant has paid into Court \$ and says that that sum is enough to satisfy the plaintiff's claim [or the plaintiff's claim. for, &c.]

Dated, &c.

To Mr. X. Y.,  
the Plaintiff's Solicitor.

Z.,  
Defendant's Solicitor.

### No. 22.

*Acceptance of sum paid into Court.*—O. XXVI., r. 4.

In the High Court of Justice,

Division.

*A. B. v. C. D.*

Take notice that the plaintiff accepts the sum of \$ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

Dated, &c.

X. Y.,  
Plaintiff's Solicitor.

To Z.,  
Defendant's Solicitor.



deed numbered \_\_\_\_\_ in that notice] at my office on \_\_\_\_\_ day next  
the \_\_\_\_\_ instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of  
the documents mentioned in your notice of the \_\_\_\_\_ day of  
A.D. \_\_\_\_\_ on the ground that [state the ground] :—

Dated, &c.

X. Y.,  
Solicitor for

## No. 26.

*Notice to admit Documents.*—O. XXVIII., r. 3.

In the High Court of Justice.  
\_\_\_\_\_ Division.

A. B. v. C. D.

Take notice that the plaintiff [or defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his solicitor or agent at \_\_\_\_\_, on \_\_\_\_\_, between the hours of \_\_\_\_\_; and the defendant [or plaintiff] is hereby required, within 4 days from the said day, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies, and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

X. Y.,  
Solicitor for

Dated, &c.,

To E. F., solicitor [or agent] for defendant [or plaintiff].  
G. H., solicitor [or agent] for plaintiff [or defendant].

[Here describe the documents, the manner of doing which may be as follows:]

### ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A. B. and C. D. first part, and E. F. second part .....	January 1, 1878.
Indenture of lease from A. B. to C. D. ....	February 1, 1878.
Indenture of release between A. B., C. D., first part, &c. ....	February 2, 1878.
Letter—defendant to plaintiff .....	March 1, 1878.
Policy of Insurance on goods by ship "Isabella," on voyage from Toronto to Kingston .....	July 3, 1877.
Memorandum of agreement between C. D., captain of said ship, and E. F. ....	August 1, 1878.
Bill of exchange for \$500 at 3 months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H. ....	May 1, 1879.

NOTICES.

[21]

COPIES.

Description of Documents.	Dates.	Original or duplicate served, sent, or delivered, when, how and by whom.
Register of baptism of <i>A.B.</i> in the parish of <i>X</i> .....	January 1, 1848.	Sent by General Post February 2, 1848.
Letter—plaintiff to defendant.	February 1, 1848.	
Notice to produce papers.....	March 1, 1878.	Served March 2, 1878 on defendant's attorney by <i>E. F.</i> , of —
Record of a Judgment of the Court of Queen's Bench in an action, <i>J.S.</i> and <i>J.N.</i> .....	Trinity Term, 10th Vic.	

No. 27.

*Notice of Trial.*—O. XXXI., r. 2.

In the High Court of Justice.  
— Division.

*A.B. v. C.D.*

Take notice of trial of this action [or the issues in this action ordered to be tried] at for the day of next  
*X. Y.*, plaintiff's solicitor [or as the case may be].

Dated, &c.

To *Z.*, defendant's solicitor [or as the case may be].

No. 28.

*Notice of Entry of Demurrer for Argument.*—O. XXIV., r. 7.

In the High Court of Justice.  
— Division.

Between

Plaintiff,

and

Defendant.

Take notice, that have this day entered for argument the demurrer of the to the in this action.

Dated the day of 18 .

(Signed)

of

Solicitor for the

To

## No. 29.

*Notice of Discontinuance.—O. XIX.*

In the High Court of Justice.

— Division.

Between

and

Plaintiff,

Defendant.

Take notice, that the plaintiff hereby wholly discontinues this action,  
(or withdraws so much of his claim in this action as relates to, &c.

(If not against all the defendants add), "As against the defendant," &c.

Dated the      day of      18 .

(Signed)

of

Solicitor for the plaintiff.

## No. 30.

*Notice of Cross-examination of Deponents at Trial on Affidavits.—**O. XXXIV., r. 4.*

In the High Court of Justice.

— Division.

Between

and

Plaintiff,

Defendant.

Take notice, that the      intend at the trial of this action to cross-examine the several deponents named and described in the schedule hereto on their affidavits therein specified.

And also take notice that you are hereby required to produce the said deponents for such cross-examination before the Court aforesaid.

Dated the      day of      18 .

Solicitor for the

To

THE SCHEDULE above referred to.

Name of Deponent.	Address and Description.	Date when affidavit filed.

## No. 31.

*Notice of Renewal of Writ of Execution.—O. XXXVIII., r. 15.*

In the High Court of Justice.

— Division.

Between

and

Plaintiff,

Defendant.

# AFFIDAVITS.

[23]

Take notice, that the writ of \_\_\_\_\_ issued in this action directed to the  
sheriff of \_\_\_\_\_ and bearing date the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, has been  
renewed for one year from the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.  
(Signed)  
Solicitor for the

To the sheriff of

Plaintiff,  
Defendant.  
as this action,  
to, &c.  
ndant," &c.

## APPENDIX (C).

### AFFIDAVITS.

No. 32.

*Affidavit of Service of Summons.*—O. VI., r. 12 (a).

In the High Court of Justice.

\_\_\_\_\_ Division.

Between

Plaintiff,  
Defendant.  
tion to cross-  
chedule hereto  
duce the said  
said.

and

Plaintiff,

Defendant.

I, \_\_\_\_\_ of \_\_\_\_\_ solicitor for the above-named \_\_\_\_\_ make oath and say  
as follows:—

I did on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, before the hour of \_\_\_\_\_ in the  
noon, serve the above-named \_\_\_\_\_ in this action with a true  
copy of the summons hereto annexed marked A, by leaving it at the  
of the said \_\_\_\_\_ situate, &c., with there  
Sworn at this day of \_\_\_\_\_ 18 \_\_\_\_\_.

Before me, &c.

This affidavit is filed on behalf of the

affidavit filed.

No. 33.

*Affidavit by Landlord.*—O. VIII., r. 13.

In the High Court,

\_\_\_\_\_ Division.

Between A.B., Plaintiff,

and

C.D., Defendant.

II., r. 15.

I, \_\_\_\_\_ of \_\_\_\_\_ make oath and say  
as follows:—

I am in possession of the land sought to be recovered in this action by  
myself (or by the said C.D., my tenant, (as the case may be).

Sworn at this day of

Before me, etc.

Plaintiff,  
Defendant.

## No. 34.

*Affidavit as to Documents.*—O. XXVII., r. 10.

In the High Court of Justice.

— Division.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, Defendant.

I, the above-named defendant *C.D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters, or any of them other than and except the documents set forth in the said first and second schedules hereto, and the pleadings and other proceedings in the action.

## No. 35.

*Affidavit on Production when made by an officer of a Corporation.*—

O. XXVII., rr. 7, 10.

In the High Court.

— Division.

Between *A.B.*, Plaintiff,  
and  
*C.D.*, Defendant.

I,            of           , make oath and say as follows:—

1. I am the (*here state the name of the office held by the deponent in the service of the Company on whose behalf he makes the affidavit*), and as such,



have knowledge of all documents which are, or have been, in the custody or possession of the said (Company), relating to the matters in question in this action.

2. I am cognizant of the matters in question in this action.

3. The said defendants have in their possession or power, the documents relating to the matters in question in this action, set forth in the first and second parts of the first schedule hereto.

4. The said defendants object to produce the said documents set forth in the second part of the said first schedule hereto.

5. That (*here state on what grounds the objection is made, and verify the facts as far as may be*).

6. The said defendants have had, but have not now, in their possession or power, the documents relating to the matters in question in this action, set forth in the second schedule hereto.

7. The last mentioned documents were last in the possession or power of the said defendants on (*state when*).

8. That (*here state what has become of the last mentioned documents, and in whose possession they now are*).

9. According to the best of my knowledge, information, and belief, the said defendants have not now, and never had, in their possession, custody, or power, or in the possession, custody, or power of myself, or of any of its solicitors or agents, or of any person or persons whomsoever, on its behalf any (*proceed as in last form*).

No. 36.

*Affidavit in support of Garnishee Order.*—O. XLI., r. 5.

In the High Court of Justice.

— Division.

Between

and

Judgment Creditor,

Judgment Debtor.

I, of the above-named judgment creditor [*or solicitor for the above-named judgment creditor*] make oath and say as follows:—

1. By a judgment of the Court given in this action, and dated the day of 18 , it was adjudged that I [*or the above-named judgment creditor*] should recover against the above-named judgment debtor the sum of \$ , and costs to be taxed, and the said costs were by a taxing officer's certificate dated the day of 18 , allowed at \$ .

2. The said still remains unsatisfied to the extent of \$ and interest amounting to \$ .

3. (*Name, address and description of garnishee*) is indebted to the judgment debtor in the sum of \$ or thereabouts.

4. The said (*insert name of garnishee*) is within the jurisdiction of this Court.

Sworn at the day of 18 .

Before me

This affidavit is filed on behalf of the

## No. 37.

*Affidavit on Interpleader.—O. I., r. 2.*

In the High Court of Justice.  
 ——— Division.

Between

and

Plaintiff,

Defendant.

I, \_\_\_\_\_ of \_\_\_\_\_ the defendant in the above action, make oath and say as follows:—

1. The writ of summons herein was issued on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and was served on me on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_. I have not yet delivered a statement of defence herein.

2. The action is brought to recover \_\_\_\_\_. The said \_\_\_\_\_ (is or are) in my possession, but I claim no interest therein.

3. The right to the said subject-matter of this action has been and is claimed (if claim in writing make the writing an exhibit) by one \_\_\_\_\_ who (state expectation of suit or that he has already sued).

4. I do not in any manner collude with the said \_\_\_\_\_ or with the above-named plaintiff, but I am ready to bring into Court or to pay or dispose of the said \_\_\_\_\_ in such manner as the Court may order or direct.

Sworn at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.  
 Before me

This affidavit is filed on behalf of the

## APPENDIX (D).

## PLEADINGS.—O. XV.

## No. 38.

O. XV., r. 4.

Account  
 stated.

In the High Court of Justice,  
 ——— Division

Writ issued 3rd September 18 \_\_\_\_.

A. B., Plaintiff,

and

E. F., Defendant.

*Statement of Claim.*

Claim.

1. Between the 1st of January and the 28th of February, 1879, the plaintiff supplied to the defendant various articles of drapery; and payments on account were from time to time made by the defendant.

2. On the 28th of February, 1879, a balance remained due to the plaintiff of \$325, and an account was on that day sent by the plaintiff to the defendant shewing that balance.

3. On the 1st of March following, defendant paid the plaintiff by cheque \$32 on account of the same. The residue of the said balance, amounting to \$293, has never been paid.

The plaintiff claims \$

The plaintiff proposes that this action should be tried at Whitby.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

No. 39. O. XV., r. 4. See Form No. 12.

In the High Court of Justice,  
Division.

Administra-  
tion of an  
Intestate's  
Estate.

Writ issued 22nd December, 18 .  
In the matter of the estate of A. B. deceased.

Between E. F., Plaintiff,  
and  
G. H., Defendant.

*Statement of Claim.*

1. A. B., of K., in the County of L., died on the 1st July, 1880, in- Claim.  
testate. The defendant, G. H., is the administrator of A. B.

2. A. B. died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered into possession of the real estate of A. B., and received the rents thereof.

3. A. B. was never married; he had one brother only, who pre-deceased him without having been married, and two sisters only, both of whom also pre-deceased him, namely M. N. and P. Q. The plaintiff is the only child of M. N., and the defendant is the only child of P. Q.

The plaintiff claims—

1. To have the real and personal estate of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. To have a receiver appointed of the rents of his real estate.

3. Such further or other relief as the nature of the case may require.

The plaintiff proposes that this action should be tried at London.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

No. 40. O. XV., r. 4.

In the High Court of Justice,  
Division.

In the matter of the estate of A. B., deceased.

Between *E. F.*, Plaintiff,  
and  
*G. H.*, Defendant.

*Statement of Defence.*

Defence.

1. The plaintiff is an illegitimate child of *M. N.* She was never married. The defendant admits the other allegations contained in the 1st and 3rd paragraphs of the plaintiff's statement of claim.

2. The intestate was not entitled to any real estate at his death.

3. The personal estate of *A. B.* was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

Delivered the day of 18 by  
*X. Y.*, of Defendant's Solicitor.

No. 41. O. XV., r. 4. See Form No. 12.

In the High Court of Justice,  
Division.

Administra-  
tion of a Tes-  
tator's Estate,

Writ issued 22nd December, 18 .  
In the matter of the estate of *A. B.* deceased.

Between *E. F.*, Plaintiff,  
and  
*G. H.*, Defendant.

*Statement of Claim.*

Claim.

1. *A. B.*, of *K.*, in the county of *L.*, duly made his last will, dated the 1st day of March, 1873, whereby he appointed the defendant and *M. N.* (who died in the testator's lifetime), executors thereof, and devised and bequeathed his real and personal estate to and to the use of his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain 21, or a daughter who should attain that age, or marry, upon trust as to his real estate for the person who would be the testator's heir at-law, and as to his personal estate for the persons who would be the testator's next of kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the 1st day of July, 1880, and his will was proved by the defendant, on the 4th of October, 1880. The plaintiff has not been married.

3. The testator was at his death entitled to real and personal estate; the defendant entered into the receipt of the rents of the real estate and got in the personal estate; he has sold some part of the estate.

The plaintiff claims—

1. To have the real and personal estate of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. Such further or other relief as the nature of the case may require.

The plaintiff proposes that this action should be tried at Napanee.

Delivered the day of 18 by  
*X. Y.*, of Plaintiff's Solicitor.

**O. XV., r. 4.**

**In the matter of the estate of A. B. deceased.**

Between *E. F.*, Plaintiff,  
and  
*G. H.*, Defendant.

**Statement of Defence.**

1. *A. B's* will contained a charge of debts; he died insolvent; he was entitled at his death to some real estate which the defendant sold, and which produced the net sum of \$22,500, and the testator had some personal estate which the defendant got in and which produced the net sum of \$5,400.

2. The defendant applied the whole of the said sums and the sum of \$84 which the defendant received from rents of the real estate, in the payment of the funeral and testamentary expenses and debts of the testator.

8. The defendant made up his accounts and sent a copy thereof to the plaintiff on the 10th of January, 1880, and offered the plaintiff free access to the vouchers, to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant admits the allegations in the 1st and 2nd paragraphs of the plaintiff's statement of claim.

5. The defendant submits that the plaintiff ought to pay the costs of this action.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ by  
X. Y., of \_\_\_\_\_ Defendant's Solicitor.

No. 43.

*Action against Del credere Agents.*—O. XV., r. 4.

**Agent.**

Writ issued 28rd August, 18 .

Between *A. B. and Company*, Plaintiffs,  
and  
*E. F. and Company*, Defendants.

*Statement of Claim.*

1. The plaintiffs are manufacturers of artificial manures, carrying on Claim. business at \_\_\_\_\_, in the county of \_\_\_\_\_.

2. The defendants are commission agents, carrying on business in Toronto.

8. In the early part of the year \_\_\_\_\_, the plaintiffs commenced, and down to the \_\_\_\_\_ 18\_\_\_\_, continued to consign to the defendants, as

their agents, large quantities of their manures for sale, and the defendants sold the same and received the price thereof and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at        per cent. on all sales effected by them, which is the rate of commission ordinarily charged by all del credere agents in the said trade. And the defendants, in fact, always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.

5. The plaintiffs contend that the defendants are liable to them as del credere agents, but if not so liable are under the circumstances herein-after mentioned liable as ordinary agents.

6. On the       , the plaintiffs consigned to the defendants for sale a large quantity of goods, including        tons of

7. On or about the       , the defendants sold        tons of        part of such goods to one *G. H.* for \$       , at 3 months' credit, and delivered the same to him.

8. *G. H.* was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence, have ascertained the fact.

9. *G. H.* did not pay for the said goods, but before the expiration of the said 3 months for which credit had been given, the estate of the said *G. H.* was placed in liquidation under the insolvency Acts then in force; and the plaintiffs have never received the said sum of \$        or any part thereof.

The plaintiffs claim :

1. Damages to the amount of \$

2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried at Hamilton.

Delivered the        day of        18        by  
X. Y., of        Plaintiff's Solicitor.

No. 44.

O. XV., r. 4.

[Title as in claim, omitting date of issue of writ.]

*Statement of Defence.*

Defence.

1. The defendants deny that the said commission of        per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by del credere agents in the said trade, and say that the same is the ordinary commission for agents other than del credere agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

2. The defendants deny that they were ever liable to the plaintiffs as del credere agents.

8. With respect to the 8th paragraph of the plaintiffs' statement of claim, the defendants say that at the time of the said sale to the said *G. H.*, the said *G. H.* was a person in good credit. If the truth is that the said *G. H.* was then in insolvent circumstances, the defendants did not suspect and had not reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

## [31]

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, by  
X. Y., of \_\_\_\_\_ Defendant's Solicitor.

**In the High Court of Justice,  
— Division.**

Writ issued 28rd August, 18 .  
Between *A. B.* and *C. D.*, Plaintiffs,  
and  
*E. F.* and *G. H.*, Defendants.

1. Messrs. *M. N. & Co.*, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, drew a bill Claim. of exchange upon the defendants for \$ \_\_\_\_\_, payable to the order of the said Messrs. *M. N. & Co.* 3 months after date, and the defendants accepted the same.

[8. (*Introduced by amendment to meet the defence in the defendant's statement of defence infra*). The plaintiff gave value and consideration for the said bill in manner following, that is to say: on the day 18, the said Messrs. *M. N. & Co.* were indebted to the plaintiff in about \$ the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about \$ which last mentioned goods have since been delivered by him to them. And at the time of the order for such last mentioned goods it was agreed between Messrs. *M. N. & Co.* and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.]

The plaintiffs claim :—(*state claim*)

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, by  
X. Y., of \_\_\_\_\_ Plaintiffs' Solicitor.

**[Title.]**

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as Defence.



hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed between the said Messrs. *M. N. & Co.*, the drawers thereof, and the defendants, that the said Messrs. *M. N. & Co.* should sell and deliver to the defendants free on board ship at the port of \_\_\_\_\_ 1200 tons of coal during the month of \_\_\_\_\_, and that the defendants should pay for the same by accepting the said Messrs. *M. N. & Co.*'s draft for \$ \_\_\_\_\_ at 6 months.

3. The said Messrs. *M. N. & Co.* accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. *M. N. & Co.* of the said 1200 tons of coals under their said contract, and the time for delivery has long since elapsed; but the said Messrs. *M. N. & Co.* never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendant's acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the 2nd, 3rd, and 4th paragraphs hereof.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ by  
X. Y., of \_\_\_\_\_ Defendants' Solicitor.

No. 47.

O. XV., r. 4; O. XX.

*(Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence.)*

[Title.]

*Reply.*

1. The plaintiff joins issue upon the defendant's statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, the said Messrs. *M. N. & Co.* were indebted to the plaintiff in about \$ \_\_\_\_\_ the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about \$ \_\_\_\_\_ which last mentioned goods have since been delivered by him to them. At the time of the order for such last mentioned goods it was agreed between Messrs. *M. N. & Co.* and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ by  
X. Y., of \_\_\_\_\_ Plaintiff's Solicitor.

No. 48.

O. XV., r. 4; O. XII., r. 5.

In the High Court of Justice,  
— Division.

Promissory  
Note.

Writ issued 3rd November, 18 .

Between A. B., Plaintiff,  
and  
E. F., Defendant.

*Statement of Claim.*

1. The defendant on the                      day of                      Claim.  
made his promissory note, whereby he promised to pay to the plaintiff or  
his order \$                      3 months after date.
2. The note became due on the                      day of  
18 , and the defendant has not paid it.

The plaintiff claims :—

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried at Peterborough.

Delivered the                      day of                      18 by  
X. Y., of                      Plaintiff's Solicitor.

No. 49.

O. XV., r. 4.

[Title.]

*Statement of Defence.*

1. The defendant made the note sued upon under the following circum- Defence.  
stances :—The plaintiff and defendant had for some years been in partner-  
ship as coal merchants, and it had been agreed between them that they  
should dissolve partnership, that the plaintiff should retire from the  
business, that the defendant should take over the whole of the partnership  
assets and liabilities, and should pay the plaintiff the value of his share in  
the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books,  
and inquire into the state of the partnership assets and liabilities ; and he  
did accordingly examine the books, and make the said inquiries, and he  
thereupon represented to the defendant that the assets of the firm exceeded  
\$10,000, and that the liabilities of the firm were under \$3,000, whereas the  
fact was that the assets of the firm were less than \$5,000, and the liabilities  
of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the last paragraph induced the  
defendant to make the note now sued on, and there never was any other  
consideration for the making of the note.

Delivered the                      day of                      18 by  
X. Y., of                      Defendant's Solicitor.

## No. 50.

*Statement of Claim.*—O. XV., r. 4.

Action on Bill In the High Court of Justice,  
of Exchange. \_\_\_\_\_ Division.

Writ issued 1st February, 18 .

Between A. B. Plaintiff,  
and  
C. D., Defendant.

Claim.

1. The plaintiff on the \_\_\_\_\_ day of \_\_\_\_\_ 188 , drew  
a bill of exchange upon the defendant for \$ payable 3 months  
after date, and the defendant accepted the same.

2. The bill became due on \_\_\_\_\_ day of \_\_\_\_\_ 188 , and the  
defendant has not paid it.

3. [(*Amendment to meet defence infra.*) The defendant, who at the time  
of the acceptance of the said bill was an infant within the age of 21 years,  
ratified and confirmed the said acceptance after he attained full age and  
before action, by a writing made and signed by him.]

The plaintiff claims :—(*State claim.*)

The plaintiff proposes that this action should be tried at Picton.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 by  
X. Y., of \_\_\_\_\_ Plaintiff's Solicitor.

## No. 51.

*Statement of Defence.*—O. XV., r. 4.

[Title.]

At the time of making the alleged acceptance of the said bill the defend-  
ant was an infant within the age of 21 years.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 by  
X. Y., of \_\_\_\_\_ Defendant's Solicitor.

## No. 52.

O. XV., r. 4 ; O. XX.

(*Reply where plaintiff does not introduce into his statement of claim the  
allegations necessary by way of reply to the defence.*)

[Title.]

*Reply.*

The defendant C. D., who at the time of the acceptance of the said bill  
was an infant within the age of 21 years, ratified and confirmed the said  
acceptance after he attained full age and before action, by a writing made  
and signed by him.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 , by  
X. Y., of \_\_\_\_\_ Plaintiff's Solicitor.

No. 53.

O. XV., r. 4; O. XII., r. 5.

In the High Court of Justice,  
— Division.

Bill of  
exchange and  
consideration.

Writ issued 8rd October, 18 .

Between A. B. and C. D., Plaintiffs,  
and  
E. F. and G. H., Defendants.

*Statement of Claim.*

1. The plaintiffs are merchants, factors, and commission Claim.  
agents, carrying on business in Toronto.

2. The defendants are merchants and commission agents, carrying on  
business at Montreal.

3. For several years prior to the 18 , the plaintiffs  
had been in the habit of consigning goods to the defendants for sale, as  
their agents, and the defendants had been in the habit of consigning goods  
to the plaintiffs for sale, as their agents; and each party always received  
the price of the goods sold by him for the other; and a balance was from  
time to time struck between the parties, and paid.

On the of , the moneys so received by the  
defendants for the plaintiffs, and remaining in their names, largely ex-  
ceeded the moneys received by the plaintiffs for the defendants, and a  
balance of \$ was accordingly due to the plaintiffs from the defendants.

4. On or about the , 18 , the plaintiffs sent to the de-  
fendants a statement of the accounts between them, shewing the said sum  
as the balance due to the plaintiffs from the defendants; and the defend-  
ants agreed to the said statement of accounts as correct, and to the said  
sum of \$ as the balance due by them to the plaintiffs, and  
agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them 8 months'  
time for payment of the said sum of \$ , and the plaintiffs agreed  
to do so upon the defendants accepting the bills of exchange hereinafter  
mentioned.

6. The plaintiffs thereupon on the drew 2 bills  
of exchange upon the defendants, one for \$ , and the other for  
\$ , both payable to the order of the plaintiffs 8 months after  
date, and the defendants accepted the bills.

The said bills became due on the 18 , and the de-  
fendants have not paid the bills, or either of them, nor the said sum of  
\$

The plaintiffs claim :—

\$ and interest to the date of judgment.

The plaintiffs propose that this action should be tried at Toronto.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

No. 54.

O. XV., r. 4.

False imprisonment.

In the High Court of Justice,  
— Division.

Writ issued 8rd September, 18 .

Between A. B., Plaintiff,  
and  
E. F., Defendant.*Statement of Claim.*

Claim.

1. The plaintiff is a journeyman painter. The defendant is a builder, having his building yard, and carrying on business at Ottawa, and for 6 months before and up to the 22nd August, 18 , the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 18 , the plaintiff came to work as usual in the defendant's yard, at about 6 o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman, X. Y., who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but X. Y. gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorized and assented to his being given into custody; and in any case X. Y., in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot, to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for 8 months.

The plaintiff claims \$ damages.

The plaintiff proposes that this action should be tried at Ottawa.

Delivered the  
X. Y., of

day of  
Plaintiff's Solicitor.

18 by

No. 55.

O. XV., r. 4.

[Title.]

*Statement of Defence.*

Defence.

1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorized or

assented to his being given into custody. And the said X. Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about 5 or 6 o'clock on the \_\_\_\_\_, being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the \_\_\_\_\_ the plaintiff, who had left off work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from, and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X. Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X. Y. had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

Delivered the  
X. Y., of

day of  
Defendant's Solicitor.

18 by

No. 56.

O. XV., r. 4.

In the High Court of Justice,  
\_\_\_\_\_ Division.

Fraud.

Writ issued 8rd September, 188 .

Between A. B., Plaintiff,  
and  
E. F., Defendant.

*Statement of Claim.*

1. In or about \_\_\_\_\_ March, 1880, the defendant caused to be inserted Claim. in the \_\_\_\_\_ Newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing 12 barrels a week. The advertisement directed application for particulars to be made to X. Y.

2. The plaintiff having seen the advertisement applied to X. Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at \_\_\_\_\_ with the lease, fixtures, fittings, stock-in-trade, and good-will.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than 12 barrels a week.

4. On the 5th of April, 1880, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant, for \$2000, and paid to him a deposit of \$800 in respect of the purchase.

5. On the 15th of April the purchase was completed, an assignment of the lease executed, and the balance of the purchase money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business; and at each of those times, and for a long time before, it had never been a business of more than 4 barrels a week. And the said premises were not of the value of \$2000, or any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims \$ damages.

The plaintiff proposes that this action should be tried at Brockville.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

No. 57.

O. XV., r. 4.

[Title.]

*Statement of Defence.*

*Defence.*

1. The defendant says that at the time when he made the representations mentioned in the 3rd paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over 12 barrels a week. And the defendant denies the allegations of the 6th paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, shewing fully and truthfully all the details of the said business, and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

3. The defendant admits the allegations of paragraphs 1, 2, 3 and 4 of the statement of claim.

Delivered the day of 18 by  
X. Y., of Defendant's Solicitor.



No. 58.

O. XV., r. 4.

In the High Court of Justice,  
 ——— Division.

Guarantee.

Writ issued 3rd September, 1881.

Between A. B. and C. D., Plaintiffs,  
 and  
 E. F. and G. H., Defendants.

*Statement of Claim.*

1. The plaintiffs are brewers, carrying on their business at Guelph, Claim. under the firm of X. Y. & Co.

2. In the month of March, 1879, M. N. was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants and M. N., that the plaintiffs should employ M. N. upon the defendants entering into the guarantee hereinafter mentioned.

3. An engagement in writing was accordingly made and entered into, on or about the 30th March, 1879, between the plaintiffs and the defendant, whereby, in consideration that the plaintiffs would employ M. N. as their collector, the defendants agreed that they would be answerable for the due accounting by M. N. to the plaintiffs for, and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.

4. The plaintiffs employed M. N. as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st December, 1880.

5. At various times between the 29th of September, and the 25th of December, 1880, M. N. received on behalf of the plaintiffs and as their collector, sums of money from debtors of the plaintiffs, amounting in the whole to the sum of \$3,400; and of this amount M. N. neglected to account for or pay over to the plaintiffs sums amounting in the whole to \$908, and appropriated the last-mentioned sums to his own use.

6. The defendants have not paid the last-mentioned sums, or any part thereof, to the plaintiffs.

The plaintiffs claim:—(State claim.)

The plaintiffs propose that this action should be tried at Guelph.

Delivered the                      day of                      18                      by  
 X. Y., of                      Plaintiff's Solicitor.

No. 59.

O. XV., r. 4.

In the High Court of Justice,  
 ——— Division.

Negligence.

Writ issued 3rd September, 1881.

Between A. B., Plaintiff,  
 and  
 E. F., Defendant.

*Statement of Claim.*

1. The plaintiff is a shoemaker, carrying on business at Toronto. The Claim. defendant is a soap and candle manufacturer at the same place.

2. On the 23rd May, 1881, the plaintiff was walking eastward along the south side of King Street, in the city of Toronto, at about 3 o'clock in the afternoon. He was obliged to cross Yonge Street, which is a street running into King Street at right angles thereto. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a two-horse van of the defendant's under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of King Street into Yonge Street. The pole of the van struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for 4 months ill and suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims \$                      damages.

The plaintiff proposes that this action should be tried at Lindsay.

Delivered the                      day of                      18                      by  
X. Y., of                      Plaintiff's Solicitor.

No. 60.

O. XV., r. 4.

[Title.]

*Statement of Defence.*

Defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge or control of the defendant's servant. The van belonged to John Smith, of                      , a carman and contractor employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said John Smith.

2. The defendant denies that the van was turned out of King Street either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says, that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

Delivered the                      day of                      18                      by  
X. Y., of                      Defendant's Solicitor.

No. 61.

*Statement of Claim.*—O. XV., r. 4.

Action for  
Assault.

In the High Court of Justice,  
— Division.

Writ issued 15th March, 18 .

Between A.B., Plaintiff,  
and  
E. F., Defendant.

1. The plaintiff is a                      carrying on business at

2. On the                      day of                      the defendant assaulted the plaintiff, and the plaintiff was seriously hurt and wounded, and was for a

long time in consequence of his injuries, unable to transact his business, and incurred expense for nursing and medical attendance.

8. [(Amendment to meet defence infra.) The defendant pretends that he committed the assault complained of in his own defence; but the facts are that the defendant was trespassing on the plaintiff's land, and refused to leave though requested to do so, whereupon the plaintiff laid his hands on the defendant in order to remove him, using so much force and no more than was necessary for that purpose.]

The plaintiff claims \$ damages.

The plaintiff proposes that this action should be tried at Cobourg.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

No. 62. O. XV., r. 4.

[Title.]

*Statement of Defence.*

The plaintiff first assaulted the defendant who, thereupon, committed the alleged assault in his own defence.

Delivered the day of 18 by  
X. Y., of Defendant's Solicitor.

No. 63. O. XV., r. 4; O. XX.

(Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence.)

[Title.]

*Reply.*

The defendant E. F., pretends that he committed the assault complained of in his own defence; but the facts are that the defendant was trespassing on the plaintiff's land, and refused to leave though requested to do so, whereupon the plaintiff laid his hands on the defendant in order to remove him, using so much force and no more than was necessary for that purpose.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

assaulted the  
and was for a

## No. 64.

Statement of Claim.—O. XV., r. 4.

Action against  
Railway Com-  
pany for Inju-  
ries by Col-  
lision caused  
through  
Negligence.

In the High Court of Justice,  
— Division.

Writ issued 1881.

Between A. B., Plaintiff.

and

— Defendants.

1. The defendants are carriers of passengers upon a railway from Toronto to

2. In January, 1881, the plaintiff took a ticket from Toronto to and was received by the defendants as a passenger to be by them safely carried in a train which started from Toronto for

3. Owing to the negligence of the defendants in the management of their railway, the train in which the plaintiff was travelling came into collision with an engine, at a short distance from Toronto.

4. The plaintiff was thrown from his seat by the said collision, and much injured about the head, and had his right arm broken.

5. [The following paragraphs may be introduced by amendment to meet Defence *infra*. The defendants allege that the plaintiff accepted the sum of \$300 in full satisfaction of all cause of action which he might have on account of the said collision, but the facts are as follows:

6. A short time after the collision an officer of the defendants procured the plaintiff to accept the said accord and satisfaction by fraudulently representing that his injuries were of a temporary nature, and that if they should afterwards turn out to be more serious than he anticipated, he would still be able to obtain further compensation from the defendants.

7. The plaintiff fully believing the said representations, and acting upon the faith thereof, was induced thereby to accept the said accord and satisfaction, and then accepted the same subject to the express condition that he should not thereby exclude himself from further compensation from the defendants if his injuries should prove more serious than he then anticipated.

8. After the acceptance of the said accord and satisfaction, the injuries suffered by the plaintiff in the collision did turn out to be more serious than was anticipated at the time aforesaid, and thereupon the plaintiff commenced the present action.]

The plaintiff claims \$ damages.

The plaintiff proposes that this action should be tried at Toronto.

Delivered the  
X. Y., of

day of  
Plaintiff's Solicitor.

18 , by

## No. 65.

O. XV., r. 4.

[Title.]

Statement of Defence.

1. Shortly after the collision referred to in the statement of claim, one of the officers of the defendants called upon the plaintiff for the purpose of

2. At such interview the plaintiff informed the said officer that he did intend to make a claim against the defendants arising out of the said collision; and it was there and then agreed between the plaintiff and the said officer acting on behalf and by the authority of the defendants, that in consideration that the defendants would pay to the plaintiff a sum of \$300., he, the plaintiff, would accept such sum from the defendants in full satisfaction and discharge of all cause of action which he had or might have against the said defendants on account of the said collision.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ by  
X. Y., of \_\_\_\_\_ Defendant's Solicitor.

O. XV., r. 4; O. XX.

**[Title.]**

1. The defendants allege that the plaintiff accepted the sum of \$300 in full satisfaction of all cause of action which he might have on account of the said collision, but the facts are as follows :

2. A short time after the collision an officer of the defendants procured the plaintiff to accept the said accord and satisfaction by fraudulently representing that his injuries were of a temporary nature, and that if they should afterwards turn out to be more serious than he anticipated, he would still be able to obtain further compensation from the defendants.

3. The plaintiff fully believing the said representations, and acting upon the faith thereof, was induced thereby to accept the said accord and satisfaction, and then accepted the same subject to the express condition that he should not thereby exclude himself from further compensation from the defendants if his injuries should prove more serious than he then anticipated.

4. After the acceptance of the said accord and satisfaction, the injuries suffered by the plaintiff in the collision did turn out to be more serious than was anticipated at the time aforesaid and thereupon the plaintiff commenced the present action.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, by  
X. Y., of \_\_\_\_\_ Plaintiff's Solicitor.

claim, one purpose of

No. 67.

O. XV., r. 4.

Landlord and In the High Court of Justice,  
 Tenant. ——— Division.

Writ issued 3rd September, 1881.

Between A. B., Plaintiff,  
 and  
 C. D., Defendant.

*Statement of Claim.*

Claim.

1. On the \_\_\_\_\_ day of \_\_\_\_\_ the plaintiff, by deed, let to the defendant a house and premises, No. 52 \_\_\_\_\_ Street, in the City of Belleville, for a term of 21 years from the \_\_\_\_\_ day of \_\_\_\_\_, at the yearly rent of \$400 payable quarterly.

2. By the said deed, the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the \_\_\_\_\_, a quarter's rent became due; and on the \_\_\_\_\_, another quarter's rent became due. On the \_\_\_\_\_, both had been in arrear for 21 days, and both are still due.

5. On the same \_\_\_\_\_, the house and premises were not, and are not now, in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims :—

1. Possession of the said house and premises.

2. \$ \_\_\_\_\_ for arrears of rent.

3. \$ \_\_\_\_\_ damages for the defendant's breach of his covenant to repair.

4. \$ \_\_\_\_\_ for occupation of the house and premises from the \_\_\_\_\_, to the day of recovering possession.

The plaintiff proposes that this action should be tried at Belleville.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ by  
 X. Y., of \_\_\_\_\_ Plaintiff's Solicitor.

No. 68.

O. XV., r. 4; O. XIII., r. 2.

Recovery of Land. In the High Court of Justice,  
 ——— Division.

Landlord and  
 Tenant.

Writ issued 4th January, 18 \_\_\_\_\_.

Between A. B., Plaintiff,  
 and  
 C. D., Defendant.

*Statement of Claim.*

1. On the \_\_\_\_\_ day of \_\_\_\_\_ the plaintiff let to the defendant a house, No. 62 \_\_\_\_\_ Street, in the city of Ottawa,

as tenant from year to year, at the yearly rent of \$420, payable quarterly, the tenancy to commence on the \_\_\_\_\_ day of \_\_\_\_\_.

2. The defendant took possession of the house and continued tenant thereof until the \_\_\_\_\_ day of \_\_\_\_\_ last, when the tenancy determined by a notice duly given.

3. The defendant has disregarded the notice and still retains possession of the house.

4. [*Amendment to meet the counter-claim infra.*] (The defendant *C. D.* sets up in his defence that the plaintiff agreed to give to the defendant a new lease and the plaintiff *A. B.* admits the agreement alleged in the statement of defence, but he refuses to grant to the defendant a lease, inasmuch as such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant, since the agreement was made, has not kept the house in good repair, and the same is now in a dilapidated condition.)

The plaintiff claims :—

1. Possession of the house.

2. \$ \_\_\_\_\_ for mesne profits from the \_\_\_\_\_ day of \_\_\_\_\_.

The plaintiff proposes that this action should be tried at Ottawa.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ by  
X. Y., of \_\_\_\_\_ Plaintiff's Solicitor.

## No. 69.

*Statement of Defence and Counter-claim.*—O. XV., rr. 3, 4 ; sec. 16, s.-s. 4.

In the High Court of Justice.

\_\_\_\_\_ Division.

Between *A. B.*, Plaintiff,  
and

*C. D.*, Defendant.

(by original action,)

And between *C. D.*, Plaintiff,  
and

*A. B.*, Defendant.

(by counter-claim.)

The defence and counter-claim of the above-named *C. D.*

1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff *A. B.*, by writing dated the \_\_\_\_\_ day of \_\_\_\_\_, and signed by him, agreed to grant to the defendant

*C. D.*, a lease of the house mentioned in the statement of claim, at the yearly rent of \$450, for the term of 21 years, commencing from the \_\_\_\_\_ day of \_\_\_\_\_, when the defendant, *C. D.*'s, tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

2. By way of counter-claim the defendant claims to have the agreement specifically performed, and to have a lease granted to him accordingly. Counter-claim.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_ by  
X. Y., of \_\_\_\_\_ Defendant's Solicitor.



No. 70.

O. XV., r. 4; O. XX.

(Reply where plaintiff does not introduce into his statement of claim the allegations necessary by way of reply to the defence.)

[Title]

Reply.

Reply.

The plaintiff, A. B., admits the agreement stated in the defendant, C. D.'s, statement of defence, but he refuses to grant to the defendant a lease, because such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair, and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant, since the making of the said agreement, has not kept the house in good repair, and the same is now in a dilapidated condition.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 by  
X. Y., of Plaintiff's Solicitor.

No. 71.

O. XV., r. 4; O. XIII., r. 2.

Recovery of  
Land.

In the High Court of Justice,  
\_\_\_\_\_ Division.

Writ issued \_\_\_\_\_ 18 .

Between A. B. and C. D., Plaintiffs,  
and  
E. L., Defendant.

Statement of Claim.

Claim.

1. K. L., late of Barrie in the County of Simcoe duly executed his last will, dated the 4th day of April, 18 , and thereby devised his lands in the County of Simcoe unto and to the use of the plaintiffs and their heirs, upon the trusts therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

2. K. L. died on the 3rd day of January 18 , and his said will was proved by the plaintiffs in the proper Surrogate Court on or about the 4th day of February, 18 .

3. K. L. was at the time of his death seised in fee of lot No. 1 in the 3rd concession of the township of \_\_\_\_\_, and lot No. 5 in the 4th concession of the township of \_\_\_\_\_, both in the County of Simcoe.

4. The defendant, soon after the death of K. L., entered into possession of the said lots, and has refused to give them up to the plaintiff.

The plaintiffs claim:—

1. Possession of the said 2 lots.

2. \$ \_\_\_\_\_ for mesne profits of the premises from the death of K. L. till such possession shall be given.

The plaintiffs propose that this action should be tried at Barrie.

Delivered the \_\_\_\_\_ day of \_\_\_\_\_ 18 by  
X. Y., of Plaintiff's Solicitor.

PLEADINGS.

[47]

No. 72.

O. XV., r. 4.

In the High Court of Justice.  
— Division.

Trespass.  
to Land.

Writ issued 3rd October, 18 .

Between A. B., Plaintiff,  
and  
E. F., Defendant.

*Statement of Claim.*

1. The plaintiff was on the 5th March, 18 , and still is the owner and Claim.  
occupier of a farm in the Township of in the County of  
, being lot No. 4 in the 7th concession of the said  
Township.

2. A private road, known as Highfield Lane, runs through a portion of  
the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's  
and is separated therefrom by a fence and ditch.

3. For a long time prior to the 5th March, 18 , the defendant had  
wrongfully claimed to use the said road for his horses, carts and waggons  
on the alleged ground that the same was a public highway, and the plaintiff  
had frequently warned him that the same was not a public highway, but  
the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 18 , the defendant came with a cart and horse,  
and a large number of servants and workmen, and forcibly used the road,  
and broke down and removed a gate which the plaintiff had caused to be  
placed across the same.

5. The defendant and his servants and workmen on the same occasion  
pulled down and damaged the plaintiff's fence and ditch upon each side of  
the road, and went upon the plaintiff's field beyond the fence and ditch,  
and injured the crops there growing, and dug up and injured the soil of  
the road; and in any case the acts mentioned in this paragraph were  
wholly unnecessary for the assertion of the defendant's alleged right to  
use, or the user of the said road as a highway.

The plaintiff claims :—

1. Damages for the wrongs complained of.
2. An order restraining the defendant from any repetition of any  
of the acts complained of.
3. Such further relief as the nature of the case may require.

The plaintiff proposes that this action should be tried at Woodstock.

Delivered the day of 18 by  
X. Y., of Plaintiff's Solicitor.

No. 73.

O. XV., r. 4.

[Title.]

*Statement of Defence.*

1. The defendant says that the road was and is a public highway for horses and carriages; and a few days before the 5th of March, 18 , the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant on the said 5th March, 18 , caused the said gate to be removed, in order to enable him lawfully to use the road by his horses, carts and waggons as a highway.

2. The defendant denies the allegations of the 5th paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or used any violence, other than was necessary to enable the plaintiff lawfully to use the highway.

Delivered the  
X. Y., of

day of  
Defendant's Solicitor.

18 by

No. 74.

*Form of Demurrer.—O. XXIV.*

In the High Court of Justice,  
— Division.

*A. B. v. C. D.*

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint or defendant's statement of defence, or of set-off, or of counter-claim] [or to so much of the plaintiff's statement of complaint as claims or as alleges as a breach of contract the matters mentioned in paragraph 7, or as the case may be], and says that the same is bad in law on the ground that [here state a ground of demurrer] and on other grounds sufficient in law to sustain this demurrer.

Delivered the  
X. Y., of

day of  
Plaintiff's Solicitor.

18 by

APPENDIX (E).

PRÆCIPES.

No. 75.

*Amended Summons.*—O. II., r. 6.

[Title, &c.]

Amend in pursuance of order [or fiat] dated          the writ of summons  
in this action by (*set out amendments when required*).

Dated the          day of          18 .

(Signed)  
(Address)

Solicitor for the

No. 76.

*Renewed Summons.*—O. VI., r. 1 (b.)

[Title, &c.]

Required in pursuance of order dated          , a renewed writ of  
summons in this action,

Dated the          day of          18 .

(Signed)  
(Address)

Solicitor for the

No. 77.

*Entry of Appearance.*—O. VIII., r. 6.

[Title, &c.]

Enter an appearance for          in this action .

Dated the          day of          18 .

(Signed)  
(Address)

The said defendant require (or do not require, as the case may be) a  
statement of claim to be delivered.

(In case the defendant wishes to dispute the amount claimed, and to make no other defence, the following may be added), The defendant disputes the amount claimed by the plaintiff, (or the defendant insists that the amount due to the plaintiff is \$            only, or the defendant insists that the amount due to the plaintiff is, \$            for principal and \$            for interest, since the            day of            &c., and no more,) as the case may be.

---

### No. 78.

*Entry of Appearance in action for land limiting Defence.*—O. VIII., r. 17.

[Title, &c.]

Enter an appearance for the defendant            in this action. The said defendant limits his defence to part only of the property mentioned in the writ of summons, namely, to

Dated the            day of            18            .  
(Signed)  
(Address)

The said defendant            require            a statement of claim to be delivered.

---

### No. 79.

*Entry of Appearance, by new defendant.*—O. XLIV., r. 3.

[Title, &c.]

Enter an appearance for            who has been served with an order dated the            day of            to carry on and prosecute the proceedings in this action.

Dated the            day of            18            .  
(Signed)  
(Address)

---

### No. 80.

*Entry of Appearance, by party served with notice, under Order 12, Rule 20.*

[Title, &c.]

Enter an appearance for            to the notice issued in this action on the            day of            18            , by the defendant            under the Rules of the Supreme Court, Order 12, Rule 20.

Dated the            day of            18            .  
(Signed)  
(Address)

The said defendant            require            a statement of claim to be delivered.

## No. 81.

*Entry of Appearance to Counter-claim.*—O. XVIII., r. 7.

[Title, &amp;c.]

Enter an appearance for  
defendant in this action.

to the counter-claim of the above-named

Dated the

day of 18 .

(Signed)

(Address)

## No. 82.

*Mandamus.*—Sec. 16, s.-s. 8.

[Title, &amp;c.]

Required in pursuance of order dated a writ of mandamus directed  
to commanding to returnable

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

## No. 83.

*Prohibition.*—Sec. 16, s.-s. 8.In the High Court of Justice,  
— Division.

In the matter of a certain now depending in the Court

Between

Plaintiff,

and

Defendant.

Required a writ of prohibition directed to the judge of the above-named  
Court and to the above-named plaintiff to prohibit them from further  
proceeding in the said

Dated the day of 18 .

(Signed)

(Address)

Solicitor for the

## No. 84.

*Certiorari.*—See Sec. 16, s.-s. 6.

[Title, &amp;c.]

Required in pursuance of order dated a writ of certiorari directed to

Dated the day of 18 .

(Signed)  
(Address)

Solicitor for the

## No. 85.

*Entry for Argument Generally.*—O. XXXVI.

[Title, &amp;c.]

Set down for argument the

Dated the day of 18 .

(Signed)  
(Address)

## No. 86.

*Entry of Demurrer for Argument.*—O. XXIV., r. 7.

[Title, &amp;c.]

Enter for argument the demurrer of to the in this action.

Dated the day of 18 .

(Signed)  
(Address)

## No. 87.

*Entry of Special Case.*

[Title, &amp;c.]

Set down for argument the special case filed in this action on the  
day of 18 , 18 ; (or set down the dated the day of  
18 , of Mr. the referee in this  
for hearing as a special case).

Dated the day of 18 .

(Signed)  
(Address)



No. 88.

*Search.*

[Title, &c.]

Search for  
Dated the            day of            18 .

(Signed)  
(Address)

Agent for

Solicitor

No. 89.

*Entry of Action for Trial.*—O. XXXI., r. 2.

[Title, &c.]

Enter this action for trial.

Dated the            day of            18 .

(Signed)  
(Address)

No. 90.

*Commission to Examine Witnesses.*—O. XXXIII., r. 2.

[Title, &c.]

Required in pursuance of order dated            a commission to examine  
witnesses directed to

Dated the            day of            18

(Signed)  
(Address)

Solicitor for the

No. 91.

*Habeas Corpus ad Testificandum.*—O. XXXII., r. 1,

[Title, &c.]

Required in pursuance of order dated            a writ of habeas corpus ad  
testificandum directed to the            to bring            before

Dated the            day of            18

(Signed)  
(Address)

Solicitor for the

## No. 92.

*Entry of Appeal.*—Sec. 39.

[Title, &amp;c.]

Enter this appeal from the order [or judgment] of \_\_\_\_\_ in this  
 action, dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ .

(Signed)  
 (Address)

## No. 93.

*Fieri Facias.*—O. XXXVIII., r. 9.

[Title, &amp;c.]

Required a writ of fieri facias directed to the sheriff of \_\_\_\_\_ to levy  
 against C. D. \_\_\_\_\_ the sum of \$ \_\_\_\_\_ and interest  
 thereon at the rate of \$ \_\_\_\_\_ per centum per annum from the  
 day of \_\_\_\_\_ [and \$ \_\_\_\_\_ costs] to \_\_\_\_\_

Judgment [or order] dated \_\_\_\_\_ day of \_\_\_\_\_  
 Taxing master's certificate, dated \_\_\_\_\_ day of \_\_\_\_\_  
 Dated the \_\_\_\_\_ day of \_\_\_\_\_

(Signed)  
 (Address)

Solicitor for the [party on whose behalf writ is  
 to issue.]

## No. 94.

*Venditioni Exponas.*—O. XXXVIII., r. 9.

[Title, &amp;c.]

Required a writ of venditioni exponas directed to the sheriff of \_\_\_\_\_  
 to sell the goods and \_\_\_\_\_ of C. D., taken under a writ of fieri  
 facias in this action tested \_\_\_\_\_ day of \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ .

(Signed)  
 (Address)

Solicitor for the

No. 95.

*Writ of Sequestration.*—O. XXXVIII., rr. 4, 9.

[Title, &c.]

Required a writ of sequestration against *C. D.* for not  
at the suit of *A. B.* directed to the sheriff of  
Order dated day of

Dated the day of 18 .

(Signed)  
(Address)

Solicitor for the

No. 96.

*Writ of Possession. (Lands.)*—O. XXXVIII., rr. 3, 9.

[Title, &c.]

Required a writ of possession directed to the sheriff of to  
deliver possession to *A. B.* of  
Judgment dated day of .

Dated the day of 18 .

(Signed)  
(Address)

Solicitor for the

No. 97.

*Writ of Delivery. (Chattels.)*—O. XXXVIII., rr. 4, 9.

[Title, &c.]

Required a writ of delivery directed to the sheriff of to  
make delivery to *A. B.* of .

Dated the day of 18 .

(Signed)  
(Address)

Solicitor for the

## No. 98.

*Writ of Attachment.*—O. XXXVIII., rr. 4, 9.

[Title, &amp;c.]

Required in pursuance of order dated  
 an attachment directed to the sheriff of  
 not delivering to A. B.

day of  
 against C. D. for

Dated the            day of            18   .

(Signed)

(Address)

Solicitor for the

## APPENDIX (F).

SUBPŒNAS, &amp;c., FOR EXAMINATION OF WITNESSES.

## No. 99.

*Subpœna ad Testificandum (General Form).*—O. XXXII., r. 1.

In the High Court of Justice,  
 ——— Division.

Between

and

Plaintiff.

Defendant.

Victoria, by the Grace of God of the United Kingdom of Great Britain  
 and Ireland Queen, Defender of the Faith, to            greeting: We com-  
 mand you to attend before            at            on            day the  
 of            18   ,            at the hour of            in the            noon, and so from  
 day to day, until the above cause is tried, to give evidence on behalf of  
 the (plaintiff or defendant.)

Witness, the Honourable  
 day of            188   .

President, &amp;c., the

## No. 100.

*Subpœna Duces Tecum (General Form).*—O. XXXII., r. 1.

[Title, &amp;c.]

Victoria by the Grace of God of the United Kingdom of Great Britain  
 and Ireland Queen, Defender of the Faith, to            greeting: We com-

mand you to attend before            at            on            day the  
day of    18    , at the hour of            in the            noon, and so from  
day to day until the above cause is tried, to give evidence on behalf of  
the            and also to bring with you and produce at the time and place  
aforesaid (*specify documents to be produced.*)

Witness, the Honourable  
day of            188    .

President, &c., the

---

No. 101.

*Subpoena ad Testificandum at Assises.*—O. XXXII., r. 1.

[Title, &c.]

Victoria, by the Grace of God of the United Kingdom of Great Britain  
and Ireland Queen, Defender of the Faith, to            greeting : We com-  
mand you to attend before our justices assigned to take the assizes in and  
for the county of            to be holden at            on            day the            day  
of            18    , at the hour of            in the            noon, and so from day to  
day during the said assizes until the above cause is tried, to give evi-  
dence on behalf of the

Witness, the Honourable  
day of            188    .

President, &c., the

---

No. 102.

*Subpoena Duces Tecum at Assises.*—O. XXXII., r. 1.

[Title, &c.]

Victoria, by the Grace of God of the United Kingdom of Great Britain  
and Ireland Queen, Defender of the Faith, to            greeting : We com-  
mand you to attend before our justices assigned to take the assizes in and  
for the county of            to be holden at            on            day the            day  
of            18    , at the hour of            in the            noon, and so from day to  
day during the said assizes, until the above cause is tried, to give evi-  
dence on behalf of the            , and also to bring with you and produce  
at the time and place aforesaid (*specify documents to be produced.*)

Witness, the Honourable  
day of            .

President, &c., the

---

No. 103.

*Commission to Examine Witnesses.*—O. XXXIII., r. 2.

[Title, &c.]

Victoria, by the Grace of God of the United Kingdom of Great Britain  
and Ireland Queen, Defender of the Faith, to            of

1. Both the said \_\_\_\_\_ and the said \_\_\_\_\_ shall be at liberty to examine on interrogatories, and *viva voce* on the subject matter thereof or arising out of the answers thereto, such witnesses as shall be produced on their behalf with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *viva voce* on the subject matters thereof or arising out of the answers thereto, the party producing any witness for examination being at liberty to re-examine him *viva voce*; and all such additional *viva voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and with the answers thereto shall be returned with the said commission.

8. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present and acting to be a true and correct copy or extract shall be annexed to the witnesses' deposition.

6. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *viva voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the commissioners or commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the \_\_\_\_\_ of the Supreme Court of Judicature on or before the \_\_\_\_\_ day of \_\_\_\_\_ inclosed in a cover under the seals or seal of the commissioners or commissioner.

8. Before you or any of you, in any manner act in the execution hereof you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, the Honourable \_\_\_\_\_ President, &c., the \_\_\_\_\_ day of \_\_\_\_\_ in the year of Our Lord one thousand eight hundred and \_\_\_\_\_

This writ was issued by  
of \_\_\_\_\_  
agent for \_\_\_\_\_  
of \_\_\_\_\_  
solicitor for the \_\_\_\_\_  
who reside \_\_\_\_\_ at \_\_\_\_\_

*Commissioners' Oath.*

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission within written. So help you God.

*Clerk's Oath.*

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commissioners to take, write down, transcribe or engross the said questions and depositions.

So help you God.

*Witnesses' Oath.*

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

*Interpreter's Oath.*

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners, to



interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

Direction of Interrogatories, &c., when returned by the Commissioners.  
The \_\_\_\_\_ of the Supreme Court of Judicature,  
Osgoode Hall,  
Toronto.

No. 104.

*Habeas Corpus ad Testificandum.*—O. XXXII., r. 1.

[Title, &c.]

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the [keeper of our prison at] \_\_\_\_\_  
We command you that you bring \_\_\_\_\_, who it is said is detained in our prison under your custody \_\_\_\_\_, before \_\_\_\_\_ at \_\_\_\_\_ on \_\_\_\_\_ day the \_\_\_\_\_ day of \_\_\_\_\_ at the hour of \_\_\_\_\_ in the noon, and so from day to day until the above action is tried, to give evidence on behalf of the \_\_\_\_\_. And that immediately after the said \_\_\_\_\_ shall have so given his evidence you safely conduct him to the prison from which he shall have been brought.

Witness, the Honourable \_\_\_\_\_ President, &c., the \_\_\_\_\_ day of \_\_\_\_\_  
This writ was issued by \_\_\_\_\_  
solicitor for the \_\_\_\_\_ who reside at \_\_\_\_\_

APPENDIX (G).

CERTIORARI AND PROHIBITION.

No. 105.

*Certiorari to County Court.*—See Sec. 16, s.-s. 6.

[Title, &c.]

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the judge of the County Court of \_\_\_\_\_ greeting :  
We, willing for certain causes to be certified of a certain cause pending in our Court before you against \_\_\_\_\_ at the suit of \_\_\_\_\_ command you that

you send to us forthwith in the Division of our High Court of Justice at Toronto, the proceedings in the said cause with all things touching the same, as fully and entirely as the same remain in our said Court before you, by whatsoever names the parties may be called therein, together with the writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, the Honourable  
day of .

President, &c., the

This writ was issued by  
of  
agent for  
of  
solicitor for the who reside at

### No. 106.

*Certiorari (General).*—See Sec. 16, s.-s. 6.

[Title, &c.]

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the greeting :

We, willing for certain causes to be certified of command you that you send to us in our High Court of Justice at Toronto, on the day of the aforesaid, with all things touching the same, as fully and entirely as they remain in together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, the Honourable  
day of .

President, &c., the

This writ was issued by  
of  
agent for  
of  
solicitor for the who reside at

### No. 107.

*Prohibition.*—Sec. 16, s.-s. 6.

[Title, &c.]

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the [judge of the County Court holden at] and to [name of plaintiff] of greeting :

Whereas we have been given to understand that you the said have [entered an action against] *C. D.* in the said Court, and that the said

## JUDICATURE ACT—FORMS.

Court has no jurisdiction in the said [cause] or to hear and determine the said [action] by reason that [*state facts shewing want of jurisdiction*].

We therefore hereby prohibit you from further proceeding in the said [action] in the said Court.

Witness, the Honourable  
day of .

President, &c., the

This writ was issued by  
of  
agent for  
of  
solicitor for the

who reside at

---

## APPENDIX (H).

---

### ORDERS.

#### No. 108.

*Summons (General Form).*—O. XLIX., r. 11.

(For use in outer counties.)

In the High Court of Justice,  
— Division.

Between

and

Plaintiff,

Defendant.

Let all parties concerned attend before me at my Chambers on  
day the       day of       18       , at       o'clock in the  
noon, on the hearing of an application on the part of       for (*state*  
*object of application, as in a notice of motion, according to forms in Ap-*  
*pendix B*).

Dated the       day of       18       .

This summons was taken out by       of       solicitor, for  
To

ORDERS.

[63]

No. 109.

*Order (General Form).*—O. XLVIII., r. 2; O. XLIX., r. 4.

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[Name of the Judge or Master] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
 and \_\_\_\_\_ Defendant.

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and

It is ordered \_\_\_\_\_ and that the costs of this application be

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

No. 110.

*Order for Service out of Jurisdiction.*—O. VII., r. 1.

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[Name of the Judge or Master] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
 and \_\_\_\_\_ Defendant

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and

It is ordered that the plaintiff \_\_\_\_\_ be at liberty to issue a writ for  
 service out of the jurisdiction against \_\_\_\_\_

And it is further ordered that the time for appearance to the said writ  
 be within \_\_\_\_\_ days after the service thereof, and that the costs of this  
 application be \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

No. 111.

*Order for Substituted Service.*—O. VI., r. 2.

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[Name of the Judge or Master] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
 and \_\_\_\_\_ Defendant.

Upon hearing \_\_\_\_\_ and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and



ORDERS.

[65]

No. 114.

*Order for Time.—O. LII., r. 9.*

In the High Court of Justice,  
— Division.

[*Name of the Judge or Master*] in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing , and upon reading the affidavit of filed  
the day of 18 , and

It is ordered that the shall have time for, &c. and that  
the costs of this application be

Dated the day of 18 .

No. 115.

*Order under Order X., No 1 (final judgment).*

In the High Court of Justice,  
— Division.

[*Name of the Judge or Master*] in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing , and upon reading the affidavit of filed  
the day of 18 , and

It is ordered that the plaintiff may sign final judgment in this action for  
the amount indorsed on the writ, with interest, if any, and costs to be  
taxed, and that the costs of this application be

Dated the day of 18 .

No. 116.

*Order under Order X., No. 6 (leave to defend unconditionally).*

In the High Court of Justice,  
— Division.

[*Name of the Judge or Master*] in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing , and upon reading the affidavit of filed  
the day of 18 , and

It is ordered that the defendant be at liberty to defend this action by  
delivering a statement of defence within days after delivery of  
the plaintiff's statement of claim, and that the costs of this application be

Dated the day of 18 .

E

## No. 117.

*Order under Order X., No. 3 (leave to defend on payment into Court).*

In the High Court of Justice,  
— Division.

[Name of the Judge or Master] in Chambers.

**Between**                      **Plaintiff,**

•         **and**

**Defendant.**

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed the  
day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_

It is ordered that if the defendant \_\_\_\_\_ pay into Court within a week from the date of this order the sum of \$ \_\_\_\_\_, he be at liberty to defend this action by delivering a statement of defence within \_\_\_\_\_ days after delivery of the plaintiff's statement of claim, but that if that sum be not so paid the plaintiff be at liberty to sign final judgment for the amount indorsed on the writ of summons, with interest, if any, and costs, and that in either event the costs of this application be \_\_\_\_\_.

Dated the            day of            18            .

## No. 118.

*Order under Order X., Nos. 4, 6, (leave to defend as to part on payment into Court, and as to residue unconditionally).*

**In the High Court of Justice,  
Division.**

[Name of the Judge or Master] in Chambers.

Between    Plaintiff,  
and    Defendant.

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed the  
day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_

It is ordered that if the defendant pay into Court within a week from the date of this order the sum of \$ , he be at liberty to defend this action as to the whole of the plaintiff's claim.

And it is ordered that if that sum be not so paid the plaintiff be at liberty to sign judgment for that sum and the defendant be at liberty to defend this action as to the residue of the plaintiff's claim.

And it is ordered that in either event the statement of defence be delivered within \_\_\_\_\_ days after delivery of the plaintiff's statement of claim, and that the costs of this application be \_\_\_\_\_

Dated the            day of            18



ORDERS.

[67]

No. 119.

*Order to amend Writ of Summons.—O. II., r. 6.*

In the High Court of Justice,  
— Division.

[Name of the Judge or Master] in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing           , and upon reading the affidavit of            filed the  
day of            18           , and

It is ordered that the plaintiff be at liberty to amend the writ of sum-  
mons in this action by           , and that the costs of this application  
be

Dated the            day of            18           .

No. 120.

*Order for names of Partners.—O. XII., r. 12.*

In the High Court of Justice,  
— Division.

[Name of the Judge or Master] in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing           , and upon reading the affidavit of            filed the  
day of            18           , and

It is ordered that the            furnish the            with a statement in  
writing, verified by affidavit, setting forth the names of the persons  
constituting the members or co-partners of their firm, pursuant to the  
rule of the Supreme Court, and that the costs of this  
application be

Dated the            day of            18           .

No. 121.

*Order for Particulars (General).*

In the High Court of Justice,  
— Division.

[Name of the Judge or Master,] in Chambers.

Between

and

Plaintiff,

Defendant.

Upon hearing           , and upon reading the affidavit of            filed the  
day of            18           , and

## JUDICATURE ACT—FORMS.

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the plaintiff's claim in this action, and that unless such particulars be delivered within days from the date of this order all further proceedings be stayed until the delivery thereof, and that the costs of this application be

Dated the       day of       18       .

No. 122.

**Order for Particulars (Accident Case).**

**In the High Court of Justice,  
— Division.**

[Name of the Judge or Master,] in Chambers.

**Between**                      **Plaintiff,**  
                                     **and**                      **Defendant.**

Upon hearing \_\_\_\_\_, and upon reading the affidavit of  
filed the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_.

It is ordered that the plaintiff deliver to the defendant an account in writing of the particulars of the injuries and expenses mentioned in the statement of claim, together with the time and place of the accident, and the particular acts of negligence complained of, and that unless such particulars be delivered within \_\_\_\_\_ days from the date of this order all further proceedings in this action be stayed until the delivery thereof, and that the costs of this application be

Dated the                      day of                      18                      .

**No. 123.**

*Order to Discharge or Vary Order on Application by Third Party.—*  
O. XLIV.

**In the High Court of Justice,  
—— Division.**

[Name of the Judge or Master,] in Chambers.

**Between**                      **and**                      **Plaintiff,**

**Defendant.**

Upon hearing \_\_\_\_\_, and upon reading the affidavit of  
filed the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_.

It is ordered that the order of \_\_\_\_\_ in this action dated the  
day of \_\_\_\_\_ 18 be discharged [or varied by \_\_\_\_\_], and that the  
costs of this application be \_\_\_\_\_

Dated the                      day of                      18                      .

ORDERS.

[69]

No. 124.

*Order to Dismiss for want of Prosecution.—O. XXV.*

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[*Name of the Judge or Master,*] in Chambers.

Between \_\_\_\_\_ and \_\_\_\_\_  
 Plaintiff,  
 Defendant.

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and \_\_\_\_\_.

It is ordered that this action be, for want of prosecution, dismissed  
 with costs, to be taxed and paid to the defendant by the plaintiff, and  
 that the costs of this application be (*costs in the cause*)

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

No. 125.

*Order for Production under Order 27, R. 4.*

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[*Name of the Judge or Master,*] in Chambers.

Between \_\_\_\_\_ and \_\_\_\_\_  
 Plaintiff,  
 Defendant.

Upon hearing \_\_\_\_\_

It is ordered that the \_\_\_\_\_ do, within 10 days after the service of  
 this order, make discovery on oath of the documents which are or have  
 been in \_\_\_\_\_ possession or power relating to any matters in question  
 in this action and that the costs of this application be

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

No. 126.

*Order to Produce Documents for Inspection under Order 27, R. 15-20.*

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[*Name of the Judge or Master*] in Chambers.

Between \_\_\_\_\_ and \_\_\_\_\_  
 Plaintiff,  
 Defendant.

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and \_\_\_\_\_.

## JUDICATURE ACT—FORMS.

It is ordered that the \_\_\_\_\_ do, at all reasonable times, on reasonable notice, produce at the office of \_\_\_\_\_ solicitor, situate at \_\_\_\_\_ the following documents, namely \_\_\_\_\_ and that the \_\_\_\_\_ be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and extracts therefrom, at \_\_\_\_\_ expense, and that in the meantime all further proceedings be stayed, and that the costs of this application be \_\_\_\_\_

Dated the                      day of                      18                      .

No. 127.

*Order of Reference.*—See Notes to Sec. 47.

In the High Court of Justice,  
— — Division.

[Name of the Judge or Master,] in Chambers.

**Between**

**and**

**Plaintiff,**

**Defendant.**

Upon hearing                      and by consent

It is ordered as follows:

[State matters to be referred] shall be referred to the award of who shall make and publish his award in writing on or before the next, or on or before such further day as he may from time to time appoint and signify in writing signed by him and indorsed on this order and the costs of the said cause and the costs of the reference and award shall be

Dated the            day of            18            .

No. 128.

*Order to remove Judgment from County Court.*—See Sec. 16, s.-s. 6.

In the High Court of Justice,  
— Division.

[Name of the Judge or Master,] in Chambers.

In the matter of a certain cause in the County Court of  
wherein

**and** **Plaintiff,**  
**Defendant.**

Upon reading the affidavit of \_\_\_\_\_ filed the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_, and the certified copy of the judgment in the cause above mentioned.

It is ordered that a writ of certiorari issue to remove the said judgment from the above-named County Court into the Division of the High Court of Justice.

Dated the                      day of                      18

## [71]

*Order for Commission to Examine Witnesses.*—O. XXXIII., rr. 3, 15.

[Name of the Judge or Master,] in Chambers.

Upon hearing \_\_\_\_\_ and upon reading the affidavit of \_\_\_\_\_ filed the  
day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_

1. A commission may issue directed to \_\_\_\_\_ of \_\_\_\_\_ a commissioner named by and on behalf of the \_\_\_\_\_ and to \_\_\_\_\_ of \_\_\_\_\_ a commissioner named by and on behalf of the \_\_\_\_\_ for the examination upon interrogatories and *viva voce* of witnesses on behalf of the said \_\_\_\_\_ and \_\_\_\_\_ respectively at \_\_\_\_\_ aforesaid before the said commissioners.

8. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any document, copy, or extract and the official copies thereof, and all other costs incidental thereto, shall be

Dated the            day of            18 .

*Order of Reference under S. 47 of the Act.*

[Name of the Judge or Master,] in Chambers.

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed the  
day of \_\_\_\_\_ 18\_\_\_\_, and \_\_\_\_\_

It is ordered that the following question arising in this action namely,  
be referred for inquiry and report to \_\_\_\_\_ under section 47 of the  
Judicature Act, and that the costs of this application be

Dated the            day of            18            .

## No. 131.

*Order of Reference under S. 48 of the Act.*

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[Name of the Judge or Master,] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
 and \_\_\_\_\_ Defendant.

Upon hearing \_\_\_\_\_ and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and \_\_\_\_\_

It is ordered that the [state whether all or some and, if so, which of the  
 questions are to be tried] in this action be tried by \_\_\_\_\_

And it is ordered that the costs of this application be \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

## No. 132.

*Order of Reference to Master.—See Notes to Sec. 47 ; O. XXIX.*

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[Name of the Judge or Master,] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
 and \_\_\_\_\_ Defendant.

Upon hearing \_\_\_\_\_, and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and \_\_\_\_\_

It is ordered that this action [or the matters of account in this action,  
 or the following questions in this action being matters of account, namely,  
 stating them] be referred to the certificate of \_\_\_\_\_

\_\_\_\_\_, with all the powers as to certifying and  
 amending of a Judge of the High Court of Justice, and that the costs of  
 the \_\_\_\_\_ and of the reference be in the discretion of the said \_\_\_\_\_,  
 and that the costs of this application be \_\_\_\_\_

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_.

## No. 133.

*Order for Examination of Witnesses before Trial.—O. XXXII., r. 1.*

In the High Court of Justice,  
 \_\_\_\_\_ Division.

[Name of the Judge or Master,] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
 and \_\_\_\_\_ Defendant.

Upon hearing \_\_\_\_\_ and upon reading the affidavit of \_\_\_\_\_ filed  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, and \_\_\_\_\_

# ORDERS.

[73]

It is ordered that a witness on behalf of the be examined  
viva voce (on oath or affirmation) before

[or before esquire, special examiner], the  
solicitor or agent giving to the solicitor or agent notice in  
writing of the time and place where the examination is to take place.

And it is further ordered that the examination so taken be filed in the  
Office of , and that an office copy or copies thereof may be  
read and given in evidence on the trial of this cause, saving all just excep-  
tions, without any further proof of the absence of the said witness than  
the affidavit of the solicitor or agent of the as to his belief, and  
that the costs of this application be

Dated the day of 18 .

## No. 134.

*Garnishee Order (Attaching Debt).*—O. XLI., r. 5.

In the High Court of Justice,  
Division

[Name of the Judge or Master] in Chambers.

Between Judgment Creditor,

and  
Judgment Debtor.

Garnishee.

Upon hearing , and upon reading the affidavit of , filed  
the day of 18 , and

It is ordered that all debts owing or accruing due from the above-  
named garnishee to the above-named judgment debtor be attached to  
answer a judgment recovered against the said judgment debtor by the  
above-named judgment creditor in the High Court of Justice on the  
day of 18 , for the sum of \$ , on which judgment  
the said sum of \$ , remains due and unpaid.

And it is further ordered that the said garnishee attend the  
in Chambers (or as the case may be) on day the day of  
18 , at o'clock in the noon, on an applica-  
tion by the said judgment creditor, that the said garnishee pay the debt  
due from him to the said judgment debtor, or so much thereof as may  
be sufficient to satisfy the judgment.

And that the costs of this application be

Dated the day of 18 .

## No. 135.

*Garnishee Order (Absolute).*—O. XLI., rr. 7, 10.

In the High Court of Justice,  
Division.

[Name of the Judge or Master] in Chambers.

Between Judgment Creditor,

and  
Judgment Debtor.

Garnishee.

Upon hearing , and upon reading the affidavit of filed  
the day of 18 , and whereby it was ordered



that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court of Justice on the      day of 18      , for the sum of \$      , on which judgment the said sum of \$      remained due and unpaid.

It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same, and that the costs of this application be

Dated the      day of      18      .

### No. 136.

*Order on Application to tax Solicitor's Bill of Costs.*—O. L., r. 17.

In the High Court of Justice,  
     Division.

[*Name of the Judge or Master*] in Chambers.

In the matter of

Gentleman,  
 One of the Solicitors of the Supreme Court.

Upon application of  
 It is ordered that the bill of fees, charges and disbursements delivered to the applicant by the above-named solicitor (or by the above solicitor to as the case may be) be referred to the      to be taxed, and that the said      do take an account of all sums of money received by the said solicitor of or on account of the applicant.  
 And it is ordered that the costs of this application be

Dated      the      day of      18      .

### No. 137.

*Order to try Action in County Court.*—See Notes to Sec. 76.

In the High Court of Justice,  
     Division.

[*Name of the Judge or Master*] in Chambers.

Between      and      Plaintiff,  
    Defendant.

Upon hearing      , and upon reading the affidavit of      filed the day of      18      , and

It is ordered that this action be tried before the County Court of      , and that the costs of this application be

Dated the      day of      18      .

ORDERS.

[75]

No. 138.

*Order for Examination touching Means.*—O. XII., r. 1.

In the High Court of Justice,  
— Division.

Judge in Chambers.

Between

Judgment Creditor,

and

Judgment Debtor.

Upon hearing , and upon reading the affidavit of filed the  
day of 18 , and

It is ordered that the above named do attend before the in  
Chambers on the day of next, at in the noon, to  
be examined upon oath touching his means of paying the judgment debt,  
and that the costs of this application be

Dated the day of 18 .

No. 139.

*Interpleader Order, No. 1.*—O. I., r. 2.

In the High Court of Justice,  
— Division.

[Name of the Judge or Master] in Chambers.

Between

Plaintiff,

and

Defendant,

and between

Claimant,

and

Respondent.

Upon hearing , and upon reading the affidavit of filed  
the day of 18 , and

It is ordered that the claimant be barred, that no action be brought  
against the above-named [sheriff] , and that the costs of this  
application be

Dated the day of 18 .

No. 140.

*Interpleader Order, No. 2.*—O. I., r. 2.

In the High Court of Justice,  
— Division.

[Name of the Judge or Master] in Chambers.

Between

Plaintiff,

and

Defendant,

and

Claimant.

Upon hearing , and upon reading the affidavit of filed the  
day of 18 , and

It is ordered that the above-named claimant be substituted as defendant in this action in lieu of the present defendant, and that the costs of this application be

Dated the                      day of                      18                      .

No. 141.

*Interpleader Order, No. 3.—O. I., r. 2.*

In the High Court of Justice.

— Division.

[Name of the Judge or Master] in Chambers.

Between

and

Plaintiff,

and between

Defendant,

Claimant,

and the said  
the sheriff of

execution creditor, and

Respondents.

Upon hearing                      , and upon reading the affidavit of                      filed the  
day of                      18                      , and

It is ordered that the said sheriff proceed to sell the goods seized by him under the writ of fieri facias issued herein, and pay the net proceeds of the sale, after deducting the expenses thereof, into Court in this cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the said claimant shall be the plaintiff and the said execution creditor shall be the defendant, and that the question to be tried shall be whether at the time of the seizure and sale by the sheriff the goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within                      from this date, and be returned by the defendant therein within                      days, and be tried at

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the said sheriff for the seizure of the said goods.

Dated the                      day of                      18                      .

No. 142.

*Interpleader Order, No. 4.—O. I., r. 2.*

In the High Court of Justice,

— Division.

[Name of the Judge or Master] in Chambers.

Between

and

Plaintiff,

and between

Defendant,

Claimant,

and the said  
the sheriff of

execution creditor, and

Respondents.

Upon hearing                      , and upon reading the affidavit of                      filed the  
day of                      18                      , and

# ORDERS.

[77]

It is ordered that upon payment of the sum of \$ into Court by the said claimant within from this date, or upon his giving within the same time security to the satisfaction of

for the payment of the same amount by the said claimant according to the directions of any order to be made herein, and upon payment to the above-named sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods seized by him under the writ of fieri facias herein.

And it is further ordered that unless such payment be made or security given within the time aforesaid the said sheriff proceed to sell the said goods, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the claimant shall be plaintiff and the execution creditor shall be defendant, and that the question to be tried shall be whether at the time of seizure and sale by the sheriff the goods seized were the property of the claimant as against the execution creditor.

And it is further ordered that this issue be prepared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days, and be tried at

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods.

Dated the day of 18

## No. 143.

*Interpleader Order, No. 5.—O. I., r. 2.*

In the High Court of Justice,  
Division.

[Name of the Judge or Master] in Chambers.

Between

and

Plaintiff,

Defendant,

and between

Claimant,

and the said  
the sheriff of

execution creditor, and

Respondents.

Upon hearing and upon reading the affidavit of filed the  
day of 18, and

It is ordered that upon payment of the sum of \$ into court by the said claimant, or upon his giving security to the satisfaction of

for the payment of the same amount by the claimant according to the directions of any order to be made herein, the above-named sheriff withdraw from the possession of the goods seized by him under the writ of fieri facias issued herein.

And it is further ordered that in the meantime, and until such payment made or security given, the sheriff continue in possession of the goods, and the claimant pay possession money for the time he so continues, unless the claimant desires the goods to be sold by the sheriff, in which case the sheriff is to sell them and pay the proceeds of the sale, after

deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein.

And it is further ordered that the parties proceed to the trial of an issue in the High Court of Justice, in which the claimant shall be plaintiff and the execution creditor shall be defendant, and that the question to be tried shall be whether at the time of the delivery of the said writ to the sheriff the goods seized were the property of the claimant as against the execution creditor.

And is further ordered that this issue be prepared and delivered by the plaintiff therein within \_\_\_\_\_ from this date, and be returned by the defendant therein within \_\_\_\_\_ days, and be tried at \_\_\_\_\_.

And it is further ordered that the question of costs and all further questions be reserved until after the trial of the said issue, and that no action shall be brought against the sheriff for the seizure of the said goods.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_.

#### No. 144.

*Interpleader Order, No. 6.—O. I., r. 2.*

In the High Court of Justice,  
\_\_\_\_\_ Division.

[Name of the Judge or Master] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
and \_\_\_\_\_ Defendant,  
and between \_\_\_\_\_ Claimant

and the said \_\_\_\_\_ execution creditor and \_\_\_\_\_ Respondents.  
the sheriff of \_\_\_\_\_

The claimant and the execution creditor having requested and consented that the merits of the claim made by the claimant be disposed of and determined in a summary manner, now upon hearing \_\_\_\_\_ and upon reading the affidavit of \_\_\_\_\_ filed the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ , and

It is ordered that

And that the costs of this application be

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_.

#### No. 145.

*Interpleader Order, No. 7.—O. I., r. 2.*

In the High Court of Justice,  
\_\_\_\_\_ Division.

[Name of the Judge or Master] in Chambers.

Between \_\_\_\_\_ Plaintiff,  
and \_\_\_\_\_ Defendant,  
and between \_\_\_\_\_ Claimant,

and the said \_\_\_\_\_ execution creditor and \_\_\_\_\_ Respondents.  
the sheriff of \_\_\_\_\_

Upon hearing \_\_\_\_\_ , and upon reading the affidavit of \_\_\_\_\_ filed  
the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ , and

## [79]

Dated the                      day of                      18                      .

Dated the            day of            18     .

The defendants [or the defendant C. D.] not having appeared herein [or not having delivered any statement of defence], it is this day adjudged that the plaintiff recover against the said defendant \$ . , and costs to be taxed.

## No. 148.

*Judgment in Default of Appearance or Defence where the Demand is Liquidated (Fixed costs).—O. IX., r. 6 ; O. XXV., r. 2.*

[Title, &c.]

The                      day of                      , 18                      .

The defendant                      not having (appeared to the writ of summons or delivered any statement of defence or demurrer) it is this day adjudged that the plaintiff recover against the said defendant \$                      and \$                      costs.

---

## No. 149.

*Judgment in Default of Appearance in action for Recovery of Land.—O. IX., r. VIII.*

[Title, &c.]

The                      day of                      18                      .

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

---

## No. 150.

*Judgment in Default of Defence in action for Recovery of Land.—O. XXV., r. 7.*

[Title, &c.]

The                      day of                      , 18                      .

No statement of defence having been delivered herein, it is this day adjudged that the plaintiff recover possession of the land in the statement of claim herein mentioned and described as

---

## No. 151.

*Judgment in Default of Defence in Action for Recovery of Land with Damages.—O. XXV., r. 8.*

[Title, &c.]

The                      day of                      , 18                      .

The defendant not having delivered any statement of defence, it is this day adjudged that the plaintiffs recover possession of the land in the



statement or claim herein mentioned, and described as  
 , in the County of , and costs to be taxed,  
 and it is further adjudged that the plaintiffs recover against the defendant  
 damages to be assessed.

Certificate for \$ , taxed costs, dated the day  
 of , 18 .

### No. 152.

*Interlocutory Judgment in Default of Appearance or Defence where Demand  
 Unliquidated.*—O. XXV., r. 4.

[Title, &c.]

The day of 18 .

No appearance having been entered to the writ of summons (or no state-  
 ment of defence or demurrer having been delivered by the defendant) herein;  
 It is this day adjudged that the plaintiff recover against the defendant  
 the value of the goods or damages, or both, as the case may be, to be assessed.

### No. 153.

*Judgment after Appearance and Order under Order X., Rule 1.*

[Title, &c.]

The day of 18 .

The defendant having appeared to the writ of summons herein, and the  
 plaintiff having by the order of , dated day of  
 18 , obtained leave to sign judgment under the Rule of the Supreme  
 Court, No. 80, for (*recite order*). It is this day adjudged that the  
 plaintiff recover against the defendant \$ and costs to be taxed.

The above costs have been taxed and allowed at \$ , as appears by  
 a Master's Certificate dated the day of 18 .

### No. 154.

*Judgment in Default of Appearance or Defence, after Assessment of  
 Damages.*—O. IX., r. 7.

[Title, &c.]

The day of , 18 .

No appearance having been entered to the writ of summons [or no  
 statement of defence or demurrer having been delivered by the defendant]  
 herein, and the damages which the plaintiff was entitled to recover hav-  
 ing been assessed at \$ , as by dated the  
 18 , appears, it is adjudged that the plaintiff recover  
 \$ and costs to be taxed.

## No. 155.

*Judgment after Trial by Court without Jury.*—O. XXXI., r. 20.

(No. 1.)

[Title, &c.]

The day of 18

This action having on the                      day of                      18                      , been tried before  
and the said                      on the                      day of                      18                      ; having ordered  
that judgment be entered for the                      for \$                      ;  
It is this day adjudged that the                      recover from the                      \$                       
and costs to be taxed.

The above costs have been taxed and allowed at \$ \_\_\_\_\_, as appears by a taxing officer's Certificate dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_.

**No. 156.**

*Judgment at Trial by Judge without a Jury.*—O. XXXI., r. 20.

(No. 2).

[Title, &c.]

The day of , 18 .

The action coming on for trial [the day of and] this day, before in the presence of counsel for the plaintiff and the defendants [or, if some of the defendants do not appear, for the plaintiff and the defendant C. D., no one appearing for the defendants E. F. and G. H., although they were duly served with notice of trial as by the affidavit of filed the day of appears,] upon hearing read the pleadings and what was alleged by counsel on both sides, this Court doth declare, &c.

And this Court doth order and adjudge, &c.

**No. 157.**

*Judgment after Trial by a Jury.*—O. XXXI., r. 20.

[Title, &c.]

The day of , 18

The action having on the 12th and 18th November, 18 , been tried before the Honourable Mr. Justice and a special jury of the county of , and the jury having found [*state findings as in Judge's or officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for the plaintiff for \$ and costs of suit [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant \$ and \$ for his costs of suit [*or that the plaintiff recover nothing against the defendant, and that the defendant recover against the plaintiff \$ for his costs of defence, or as the case may be.*]

## No. 158.

*Judgment after Trial before Referee.*—See notes to sec. 47.

[Title, &c.]

The                    day of                    18 .

The action having on the 27th November, 18 , been tried before X. Y., Esq., an official [or special] referee; and the said X. Y., having found [state substance of referee's certificate], it is this day adjudged that

## No. 159.

*Judgment after Trial of Questions of Account by Referee.*—See notes to sec. 47; sec. 48; O. XXXVI., r. 4; O. XXXVII., r. 5; Form No. 167.

[Title, &c.]

The                    day of                    18 .

The questions of account in this action having been referred to

and he having found that there is due from the                    to the                    the sum of \$                    and directed that the                    do pay the costs of the reference. It is this day adjudged that the                    recover against the said \$                    and costs to be taxed.

The above costs have been taxed and allowed at \$                    , as appears by a taxing officer's Certificate dated the                    day of                    18 .

## No. 160.

*Judgment on Motion Generally.*—O. XXXVI., r. 1.

[Title, &c.]

The                    day of                    18 . (Date of order of Court.)

This action having on the                    day of                    18 , come on before the Court on motion for judgment on behalf of the                    , and the Court after hearing counsel for the                    having ordered that                    (as in order of Court).

It is this day adjudged that the                    recover against the the sum of \$                    and costs to be taxed.

The above costs have been taxed and allowed at \$                    , as appears by a taxing officer's Certificate dated the                    day of                    18 .

**No. 161.**

*Judgment in pursuance of order. (For use where leave had been given to sign judgment unless some condition should be complied with.)—*

**O. X., r. 6.**

[Title, &c.]

The day of 18 .

Pursuant to the order of \_\_\_\_\_ dated 18 \_\_\_\_\_ whereby it was  
ordered \_\_\_\_\_ and default having been made

It is this day adjudged that the plaintiff recover against the said defendant \$            and costs to be taxed.

The above costs have been taxed and allowed at \$ \_\_\_\_\_, as appears by a taking officer's Certificate dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_.

## No. 162.

*Judgment in pursuance of order. (For use where leave has been given to sign judgment unless money should be paid into Court.)—O. X., r. 3.*

[Title, &c.]

The                      day of                      18 .

Pursuant to the order of \_\_\_\_\_ dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, whereby it was ordered that unless \$ \_\_\_\_\_ be paid into Court by the defendant within a week, the plaintiff be at liberty to sign final judgment for amount indorsed on the writ of summons with interest, if any, and costs; and the said defendant not having paid into Court the said sum of \$ \_\_\_\_\_, as conditioned by the said order, it is this day adjudged that the plaintiff recover against the defendant \$ \_\_\_\_\_ and \$ \_\_\_\_\_ for costs.

Certificate for costs dated the                      day of                      18 .

## No. 163.

*Judgment on Certificate of Clerk of County Court.*—See notes to sec. 47.

[Title, &c.]

The                      day of                      18 .

This action having been ordered to be tried in the County Court of  
and the Clerk of that Court having certified that the result was

It is this day adjudged that costs to be taxed. recover against \$ and

The above costs have been taxed and allowed at \$ \_\_\_\_\_, as appears by  
a taxing officer's Certificate dated the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_.

## No. 164.

*Judgment for Defendant's Costs on Discontinuance.*—O. XIX., r. 1.

[Title, &c.]

The            day of            18            .

The plaintiff having by a notice in writing dated the            day of            18            , wholly discontinued this action, [or withdrawn his claim in this action for or withdrawn so much of his claim in this action as relates to—*or as the case may be.*]

It is this day adjudged that the defendant recover against the plaintiff costs to be taxed.

The above costs have been taxed and allowed at \$            , as appears by a taxing officer's Certificate dated the            day of            18            .

## No. 165.

*Judgment for Plaintiff's Costs after Confession of Defence.*—  
O. XVI., r. 7.

[Title, &c.]

The            day of            18            .

The defendant in his statement of defence herein having alleged a ground of defence which arose after the commencement of this action, and the plaintiff having on the            day of            18            delivered a confession of that defence.

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at \$            , as appears by a taxing officer's Certificate dated the            day of            18            .

## No. 166.

*Judgment for Costs after Acceptance of Money paid into Court.*—  
O. XXVI., r. 1.

[Title, &c.]

The            day of            18            .

The defendant having paid into court in this action the sum of \$            in satisfaction of the plaintiff's claim, and the plaintiff having by his notice dated the            day of            18            , accepted that sum in satisfaction of his entire cause of action, and the plaintiff's costs herein having been taxed, and the defendant not having paid the same within 48 hours after the said taxation;

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

The above costs have been taxed and allowed at \$            , as appears by a taxing officer's Certificate dated the            day of            18            .

## No. 167.

*Judgment on Motion after Trial of Issue.*—See notes to sec. 47; sec. 48; O. XXXVI., r. 4; O. XXXVII., r. 5; Form No. 159.

[Title, &amp;c.]

The            day of            18    .    (*Date of order of Court.*)

The (Issues or Questions) of fact arising in this action by the order dated the    day of    ordered to be tried before    having on the    day of    been tried before    , and the    having found    , Now on motion before the Court for judgment on behalf of the    , the Court having

It is this day adjudged that the    recover against the    the sum of \$    and costs to be taxed.

The above costs have been taxed and allowed at \$    , as appears by a taxing officer's Certificate dated the    day of    18    .

## No. 168.

*Form of Judgment on Præcipe for Sale or Foreclosure WITH REFERENCE AS TO INCUMBRANCES, &c., and orders for Immediate Payment and Delivery of Possession.*—O. IX., r. 10; G. O. Chy. 426 et seq.

[Title, &amp;c.]

1. Upon the application of the plaintiff under Rule No. 78, of the rules of the Supreme Court, and upon reading the writ of summons issued in this action, and indorsed under Rule No. 17, and an affidavit of, &c., filed, &c., and an affidavit of, &c., filed, &c., of service of the said writ on the defendant, and no appearance having been entered in the said action as by the (books in the office of the    at    ) appears;

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or sale (or redemption or foreclosure), and that for these purposes the cause be referred to the Master of this Court at

3. (*Where judgment is for immediate payment add,* It is further ordered that the defendant    do forthwith after the making of the Master's report pay to the plaintiff what shall be found due to him for principal money, interest and costs at the date of the said report, and upon payment of the amount due to him (*where judgment is for sale add,* before the sale hereinbefore directed shall have taken place) that the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.)

4. (*Where judgment is for immediate possession add,* It is further ordered that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question, in this cause, or of such part thereof as may be in the possession of the said defendant.)

## No. 169.

*Form of Judgment for Foreclosure or Sale, ACCOUNT TAKEN BY REGISTRAR, and Orders for Immediate Payment and Delivery of Possession.—*

O. IX., r. 10 ; G. O. Chy. No. 426 et seq.

[Title, &c.]

1. Upon the application of the plaintiff under Rule No 78, of the rules of the Supreme Court, and upon reading the writ of summons issued in this action, and indorsed under Rule No. 17, and an affidavit of, &c., filed, &c., and an affidavit of, &c., filed, &c., of service of the said writ on the defendant, and no appearance having been entered in the said action as by the (books in the office of the                      at                      ) appears ;

2. This Court finds that the subsequent interest at the rate of                      per centum per annum on the sum of                      principal money secured by the indenture of mortgage in the pleadings mentioned, up to the day of                      next, being the time appointed for payment as hereinafter mentioned, amounts to                      and that the costs of the plaintiff amount to                      which said subsequent interest and costs being added to the sum of                      claimed by the indorsement on the writ served on the defendant                      make together the sum of                     

3. And upon the said defendant paying the said sum of                      into the bank                      at the                      between the hours of ten o'clock in the forenoon and one o'clock in the afternoon of the                      day of                      next, to the joint credit of the plaintiff and the Registrar [*where order for payment granted insert, or in case the plaintiff shall (where judgment is for sale add, before the sale hereinafter directed shall have taken place) recover the amount due to him under the order for payment hereinafter contained*], it is ordered that the said plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto ;

4. But in default of the said defendant making such payment by the time aforesaid, it is ordered (*where judgment is for foreclosure, after "it is ordered," say "that the said defendant do stand absolutely debarred and foreclosed, of and from all equity of redemption in and to the said premises ;" where judgment is for sale, then after the words "it is ordered," say "that the said premises be sold, with the approbation of the Master of this Court at                      )*

5. (*If judgment is for foreclosure omit this section.*) And it is ordered that the purchasers do pay their purchase money into Court, to the credit of this cause, and that the same when so paid in be applied in payment of what has been found due to the said plaintiff together with subsequent interest and subsequent costs, to be computed and taxed by the said Master, and that the balance do abide the further order of the Court.

6. (*Where judgment is for immediate payment add :*) It is further ordered that the defendant                      do forthwith pay to the plaintiff the sum of                      being the amount due to the plaintiff at the date hereof for principal money, interest and costs.

7. (*Where judgment is for immediate possession add :*) And it is further ordered that the defendant do forthwith deliver to the plaintiff                      , or to whom he may appoint, possession of the mortgaged premises, or of such part thereof as may be in the possession of the said defendant .



## No. 170.

*Form of Judgment for Redemption, issued by a local Master.—O. IX., r. 10;  
G. O. Chy. No. 426 et seq.*

[Title, &c.]

1. Upon the application of the plaintiff, under Rule No. 78, of the rules of the Supreme Court, and upon reading the writ of summons issued in this action, and indorsed under Rule No. 16, and an affidavit of, &c., filed, &c., and an affidavit of, &c., filed, &c., of service of the said writ on the defendant, and no appearance having been entered in the said action, as by the (books in the office of the                      at                      ) appears;

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for the redemption of the premises in question, and that for this purpose the cause be referred to the Master at

3. And it is ordered that upon the plaintiff paying to the defendant what shall be found due to him, or in case nothing shall be found due to the defendant then forthwith after the confirmation of the said Master's report, that the defendant do reconvey the said mortgaged premises, and deliver up all documents relating thereto.

4. It is further ordered that in case the plaintiff shall make default in payment as aforesaid of what may be found due to the defendant that the plaintiff's action do stand dismissed out of this Court, with costs to be paid by the plaintiff to the defendant forthwith after taxation thereof.

5. It is further ordered that in case nothing shall be found due from the plaintiff to the defendant that the defendant do pay the plaintiff his costs of this suit forthwith after taxation thereof, and in case any balance shall be found due from the defendant to the plaintiff that the defendant do pay such balance to the plaintiff forthwith after the confirmation of the Master's report.

## No. 171.

*Form of Judgment for Administration by a Local Master.—O. IX., r. 10;  
G. O. Chy. No. 467 et seq.*

1. Upon the application of the above-named plaintiff in the presence of the solicitor for the defendant [or no one appearing for the defendant although duly notified as by affidavit filed appears], and upon hearing read the affidavits and papers filed, and what was alleged by the solicitor for [the applicant or all parties].

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the administration and final winding up of the personal [and real] estate of                      and for the adjustment of the rights of all parties interested therein, by the Master of this Court at

3. And it is ordered that all balances which may be found due from the plaintiff or defendant [or any or either of them] to the said estate be, forthwith after the same shall have been ascertained as aforesaid, paid into Court to the credit of this cause, subject to the further order of the Court.

O. IX., r. 10;

O. 78, of the  
 mmons issued  
 idavit of, &c.,  
 he said writ on  
 he said action,  
 ) appears;  
 counts taken,  
 e premises in  
 to the Master

e defendant  
 found due to  
 e said Master's  
 premises, and

ake default in  
 fendant that  
 ith costs to be  
 ation thereof.  
 und due from  
 the plaintiff  
 d in case any  
 ntiff that the  
 after the con-

O. IX., r. 10;

the presence  
 he defendant  
 hearing read  
 e solicitor for

de, accounts  
 ion and final  
 or the adjust-  
 aster of this

nd due from  
 to the said  
 med as afore-  
 the further

4. And it is ordered that such personal [and real] estate, or such parts thereof as the said Master may hereafter direct, be sold, as the said Master may direct, and that the purchasers do pay their purchase money into Court to the credit of this cause, subject to the order of the Court.

5. It is further ordered that the Master do execute conveyances for any infant parties who by reason of their tender years are unable to execute the same.

### No. 172.

*Form of Judgment for Partition or Sale by a County Court Judge or a Local Master.*—O. IX., r. 10; G. O. Chy. No. 638 *et seq.*

1. Upon the application of the above-named plaintiff in the presence of the solicitor for the defendant [or no one appearing for the defendant although duly notified as by affidavit filed appears] and upon hearing read the affidavits and papers filed, and what was alleged by the solicitor for [the applicant or all parties.]

2. It is ordered that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the partition or sale of the lands and premises in the said affidavits mentioned, and for the adjustment of the rights of all parties interested therein, or for a partition of part and sale of the remainder of the said lands as may be most for the interest of the parties entitled to share therein [by the Master of this Court at

3. And it is further ordered that the said lands, or such part thereof as the said Master shall think fit, be sold, with the approbation of the said Master, freed from the claims of such of the incumbrancers thereon (if any) whose claims were created by parties entitled to the said lands before the death of the said testator [or, intestate] as shall have consented to such sale, and subject to the claims of such of them as shall not have consented [and freed also from the dower of as the case may be], and that the said Master do execute the conveyances on behalf of such of the infant parties as, by reason of their tender years, are unable to execute the same, and that the purchasers do pay their purchase money into Court to the credit of this cause, subject to the order of the Court.

4. And it is further ordered that, in the event of a partition of the whole of the said land, or in the event of a partition of a part and the proceeds of the sale of the remainder being insufficient to pay the costs in full, the costs, or so much thereof as remains unpaid, be borne and paid by the said parties according to their shares and interests in the said lands [if there be any infant parties interested in the estate add] and that the proportion of the said costs payable by the infant parties respectively be, and the same is hereby declared to be, a lien on their respective shares, and that the plaintiff do pay the guardian of the infant defendants his costs of this suit and that the same be added to his own costs.

## No. 173.

*Certificate of Taxation.*—O. L.

[Title, &amp;c.]

I certify that the costs of the \_\_\_\_\_ have been taxed and allowed  
at \$ \_\_\_\_\_

Dated &amp;c. \_\_\_\_\_

## No. 174.

*Form of Certificate of Officer after Trial by a Jury.*—O. XXX., r. 22.

[Title, &amp;c.]

I certify that this action was tried before the Honourable Mr. Justice  
and a special jury of the county of \_\_\_\_\_ on the  
\_\_\_\_\_ days of (October,) 188 \_\_\_\_\_.

The Jury found [*state findings*].

(*If the Judge gives instructions as to the judgment thereon, add*), And the  
said Judge directed, &c., [*as the case may be.*]

Dated, &amp;c. \_\_\_\_\_

## APPENDIX (J).

## No. 175.

## WRITS OF EXECUTION.

*Writ of Fieri Facias.*—O. XXXVIII., r. 14; O. XXXIX., r. 1.

In the High Court of Justice,  
\_\_\_\_\_ Division.

Between A. B., Plaintiff,  
and  
C. D. and others, Defendants.

Victoria, by the Grace of God, of the United Kingdom of Great Britain  
and Ireland, Queen, Defender of the Faith.

To the sheriff of \_\_\_\_\_ greeting.

We command you that of the goods and chattels (*or lands and tenements*)

of *C. D.* in your bailiwick you cause to be made the sum of \$                      day of                      and also interest thereon from the                      [Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be,] which said sum of money and interest were lately before the Justices of our High Court of Justice in a certain action [or certain actions, as the case may be] wherein *A. B.* is plaintiff, and *C. D.* and others are defendants [or in a certain matter there depending intituled "*In the matter of E. F.*," as the case may be] by a judgment [or order as the case may be] of our said Court, bearing date the                      day of                      adjudged [or ordered, as the case may be] to be paid by the said *C. D.* to *A. B.*, together with certain costs in the said judgment [or order as the case may be] mentioned, and which costs have been taxed and allowed (by one of the taxing masters of our said Court) at the sum of \$                      as appears by the certificate of the said taxing master, dated the                      day                      . And that of the goods and chattels (or lands or tenements) of the said *C. D.* in your bailiwick you further cause to be made the said sum of \$                      [costs], together with interest thereon from the                      day of                      , (the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order) and that you have that money and interest before our Justices aforesaid at Toronto immediately after the execution hereof, (or, in the case of lands and tenements, immediately after the expiration of twelve months from the day of your receipt hereof) to be paid to the said *A. B.* in pursuance of the said judgment [or order as the case may be]. And in what manner you shall have executed this our writ make appear to our Justices aforesaid at Toronto immediately after the execution thereof. And have there then this writ.

Witness, the Honourable                      President, &c.

The                      day of                      18                      .

### No. 176.

*Fieri Facias on Order for Costs.*—O. XXXVIII., r. 14; O. XXXIX., r. 1.

[Title, &c.]

Victoria, &c.

To the sheriff of                      greeting.

We command you that of the goods and chattels of                      in your bailiwick you cause to be made the sum of                      for certain costs which by an order of our High Court of Justice dated the                      day of                      18                      , were ordered to be paid by the said                      to                      and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of 6 per centum per annum from the                      day of                      18                      , and that you have the said sum and interest before the Justices of our High Court at Toronto, immediately after the execution hereof, to be rendered to the said                      . And in what manner you shall have executed this our writ make appear to us immediately after the execution hereof. And have there then this writ.

Witness, &c.

The                      day of                      18                      .

*Indorsements.*

Levy \$                      and \$                      for costs of execution, &c., and also interest on \$                      at 6 per centum per annum from the                      day of 18                      , until payment; besides sheriff's poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by

of  
agent for  
of

solicitor for the

The                      is a                      and resides  
at  
in your bailiwick.

No. 177.

*Writ of Venditioni Exponas.*—O. XXXIX., r. 2.

[Title, &c.]

Victoria, &c.

To the sheriff of                      greeting.

Whereas by our writ we lately commanded you that of the goods and chattels (*making the necessary variations of this form throughout in the case of lands and tenements*) of *C. D.* [*here recite the fieri facias to the end*]. And on the                      day of                      you returned to our Justices in the                      Division of our High Court of Justice aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said *C. D.* to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we being desirous that the said *A. B.* should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said *C. D.*, by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before our Justices aforesaid, at                      immediately after the execution hereof, to be paid to the said *A. B.* And have there then this writ.

Witness, &c.,                      , the                      day of                      18

No. 178.

*Writ of Possession.*—O. XXXVIII., r. 3.

[Title, &c.]

Victoria, &c.,                      to the sheriff of                      , greeting.

Whereas lately in our High Court of Justice, by a judgment of the

Division of the same Court [*A. B. recovered*] or [*E. F. was ordered to deliver to A. B.*] possession of all that                      with the appurtenances in your bailiwick: Therefore, we command you that you after the same, and without delay cause the said *A. B.* to have possession of the said land and premises with the appurtenances, and that you defend and keep him and his assigns in peaceable and quiet possession when and as often as any interruption may or shall, from time to time, be given or offered to them or any of them. Witness, etc.

also interest  
of  
ees, costs of

[Title, &c.]

the goods and  
throughout in  
ri facias to  
our Justices  
aid, that by  
and chattels  
said, which  
t of buyers.  
satisfied his  
to sale and  
D., by you  
t price that  
m such sale  
e execution  
s writ.

*The Like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on the Defendant's goods the assessed Value of it.—O. XXXVIII., r. 4.*

And we further command you that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D. in your bailiwick you cause to be made \$ [the assessed value of the chattels,] and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Toronto, immediately after the execution hereof, and have you there then this writ. Witness, etc.

*Writ of Attachment.*—O. XXXVIII., r. 4.

, greeting.

of the

E. F. was with the man that you have possessed that you possession to time.

We command you to attach *C. D.* so as to have him before us in the Division of our High Court of Justice there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, etc.

## No. 182.

Writ of Sequestration.—O. XXXVIII., r. 4.

[Title, &amp;c.]

Victoria, etc.,

To the sheriff of

, greeting :

Whereas lately in the Division of our High Court of Justice in a certain action there depending, wherein *A. B.* is plaintiff and *C. D.* and others are defendants [*or, in a certain matter there depending intitled "In the matter of E. F., as the case may be"*] by a judgment [*or order as the case may be*] of our said Court made in the said action [*or matter*], and bearing date the                      day of                      18                      , it was ordered that the said *C. D.* should [pay into Court to the credit of the said action the sum of \$                      ; *or, as the case may be*]. Know ye, therefore, that we have given, and by these presents do give, to you full power and authority to enter upon all the lands, tenements and real estate whatsoever of the said *C. D.*, and to collect, receive and sequester into your hands, not only all the rents and profits of his said lands, tenements and real estate, but also all his goods, chattels and personal estates whatsoever ; and therefore we command you, that you do at certain proper and convenient days and hours, go to and enter upon all the lands, tenements and real estates of the said *C. D.*, and that you do collect, take and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said *C. D.* shall [pay into Court, to the credit of the said action, the sum of \$                      *or, as the case may be,*] clear his contempt, and our said Court make other order to the contrary. Witness, &c.

## No. 183.

Delivery or Assessed Value of Chattels.—O. XXXVIII., r. 4.

[Title, &amp;c.]

Victoria, etc.,

to the sheriff of

greeting.

We command you that without delay you cause to be returned to the following chattels, namely (*Enumerate chattels recovered by judgment for the return of which execution has been order to issue,*) which the said                      lately (recovered against *or* was ordered to deliver to the said,) in an action in our High Court of Justice.

And we further command you that if the said cha<sup>t</sup>tels cannot be found in your bailiwick then of the goods and chattels of the said                      in your bailiwick you cause to be made, *the assessed value of the chattels*) And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution hereof. And have there then this writ.

Witness, &amp;c.

Indorsement.

If the chattels cannot be found in your bailiwick, levy \$                      the assessed value thereof, and interest thereon at 6 per centum per annum from the                      day of                      18                      until payment, besides sheriff's



poundage, officers' fees, costs of levying, and all other legal incidental expenses.

This writ was issued by  
of  
agent for  
of  
solicitor to the who reside at

The defendant is a  
and resides at  
in your bailiwick.

### No. 184.

*Warrant for arrest of a defaulting witness.*—Sec. 86.

Province of Ontario. }  
County of }

Between A. B., Plaintiff,  
and  
C. D., Defendant.

To E. F.

Whereas proof has been made before me that *H. N.* was duly subpoenaed to give evidence on behalf of the plaintiff (or as the case may be), in the above cause at the sittings of the Court of Assize (or as the case may be), at Toronto (or as the case may be, which commenced on the day of 18 ); that the presence of the said *H. N.*, is material to the ends of Justice; and that the said *H. N.* has failed to attend in accordance with the requirements of the subpoena.

These are therefore to command you to take the said *H. N.*, and to bring and have him before me at the said sittings, or before such other Judge as may be presiding thereat, there to testify what he may know concerning the matters in question in the said cause, and that you detain him in your custody until he shall have given his evidence, or until the said sittings shall have ended, or until other order be made by the Court concerning him.

Given under my hand, this day of  
A.D. 18 , at

J. J. M.

WOMEN

IN THE

ARMY

AND

NAVY

1918

---

---

PART III.

---

---

WOMEN  
JUDA UNIVERSITY  
LIBRARY

## An Act respecting the Court of Chancery.

(R. S. O. Chap. XL.)

---

**H**ER Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

### 1. This Act may be cited as "*The Chancery Act.*"

[Sec. 2 continues the existing Court. Sec. 3 refers to the seal to be used. Secs. 4 to 7 relate to the Judges, the persons eligible for that position, their rank and precedence and oath of office. Secs. 8 to 16 provide for the appointment of officers, and clerks, their duties, oaths of office, salaries and fees. Secs. 17 and 18 declare that sheriffs and gaolers shall be officers, and gaols prisons, of the Court. Secs. 19 to 22 relate to sittings of the Court, power of the Judges to act separately, and obtain assistance from Judges of other Courts. Secs. 23 to 27 provide for holding circuits. Secs. 28 and 29 refer to the chambers business, and the powers and duties of the referee in chambers (see Jud. Act, O. XLIX., r. 6). Secs. 30 to 33 relate to the accountant, moneys, and securities in Court.]

## JURISDICTION OF THE COURT.

### GENERAL JURISDICTION.

**34.** The Court shall have the like jurisdiction and power as by the laws of England were on the fourth day of March, 1837, possessed by the Court of Chancery in England in respect of the matters hereinafter enumerated, that is to say :

1. In all cases of fraud and accident ;
2. In all matters relating to trusts, executors and administrators, copartnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates ;
3. To stay waste ;
4. To compel the specific performance of agreements ;

5. To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same ;

6. To prevent multiplicity of suits ;

7. To stay proceedings in a Court of Law prosecuted against equity and good conscience ;

8. To decree the issue of Letters Patent from the Crown to rightful claimants ;

9. To repeal and avoid Letters Patent issued erroneously or by mistake or improvidently or through fraud ;

**35.** The rules of decision in the said matters shall, except when otherwise provided, be the same as governed the Court of Chancery in England in like cases on the fourth day of March, one thousand eight hundred and thirty-seven, and the Court shall possess power to enforce obedience to its orders, judgments and decrees, to the same extent as was then possessed by the Court of Chancery in England. C. S. U. C. c. 12, s. 25.

**36.** The said Court shall have the like jurisdiction and power as the Court of Chancery in England possessed on the tenth day of June, one thousand eight hundred and fifty-seven, as a Court of Equity to administer justice in all cases in which there existed no adequate remedy at Law. C. S. U. C. 12, s. 26.

**37.** The Court shall have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the eighteenth day of March, one thousand eight hundred and sixty five. 28 V. c. 17, s. 2.

Before the passing of this Act it was held that the Court did not possess such jurisdiction, *Miller v. Attorney-General*, 9 Gr. 558.

As to the equitable jurisdiction possessed by the Court of Exchequer in England, in revenue matters, see 33 Hen. 8, c. 39, s. 79; *Attorney-General v. Halling*, 15 M. & W. 687; *ex parte Colebrooke*, 7 Price, 87; *Colebrooke v. Attorney-General*, 7 Price, 146; *Manning's Exch. Pr.* 101.

**38.** If the defendant in any suit at law sets up any equitable defence, and judgment is given against him upon the equitable defence, the judgment shall be pleadable as a good bar and estoppel against any bill filed by the defendant in

Equity against the plaintiff or representative of such plaintiff at Law, in respect to the same subject matter which has been brought into judgment by such equitable defence at Law; but this section shall not be construed as declaring that such judgment at Law on an equitable defence has not been heretofore a good bar to a suit in Equity on the same subject matter. 29-30 V. c. 42, s. 3.

## INJUNCTIONS.

**39.** The Court may grant an injunction to stay waste in a proper case, notwithstanding that the party in possession claims by an adverse legal title. C. S. U. C. c. 12, s. 27.

**40.** In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as it may deem just. 28 V. c. 17, s. 3.

The question of damages will not be entertained, except in cases where the Court has jurisdiction irrespective of any right to them, *Durell v. Pritchard*, L. R. 1 Ch. App. 244; *Hindley v. Emery*, L. R. 1 Eq. 52; *Lewers v. Earl of Shaftesbury*, L. R. 2 Eq. 270; *Wedmore v. Corporation of Bristol*, 11 W. R. 136; *Swaine v. Great Northern Railway Company*, 12 W. R. 391. If the jurisdiction existed at the time of filing the bill, the Court will entertain the question of damages, though something occurs during the litigation which prevents the jurisdiction attaching at the hearing, *Davenport v. Rylands*, L. R. 1 Eq. 302; *Eastwood v. Lever*, 33 L. J. Ch. 355; *Cory v. Thames Iron Company*, 11 W. R. 589.

An inquiry as to damages sustained by infringement of a patent will not be given where an issue as to damages was not submitted to the jury, which in the same suit tried the validity of the patent, *Needham v. Oxley*, 2 N. R. 388.

The Court may, and in some cases does, grant damages in substitution for other relief, as the more appropriate remedy, *Senior v. Pawson*, L. R. 3 Eq. 330; *Martin v. Headon*, L. R. 2 Eq. 425; *Durell v. Pritchard*, L. R. 1 Ch. App. 244; *Howe v. Hunt*, 31 Beav. 420; *Franklinski v. Ball*, 33 Beav. 560; *Catton v. Wyld*, 32 Beav. 266; *Tillett v. Charing-cross Bridge Company*, 26 Beav. 419.

If the plaintiff does any act which disentitles him to specific performance of the agreement, he will not be entitled to damages, *Collier v. Stuteley*, 7 W. R. 710; *Bauman v. Matthews*, 4 L. T. N. S. 784; so if the injury complained of is trivial, *Clarke v. Clark*, L. R. 1 Ch. App. 16; *Curriers' Company v. Corbett*, 13 W. R. 1056; but in such a case the dismissal of the bill will be without prejudice to the plaintiff's right to bring an action at law, *Robson v. Whittingham*, L. R. 1 Ch. App. 442.

Where the agreement is uncertain, damages will not be given, *Lancaster v. De Trafford*, 10 W. R. 474; *Darbey v. Whittaker*, 4 Drew. 134.

Damages may be granted though not prayed by the bill, *Curriers' Company v. Corbett*, 2 Dr. & S. 355; *Catton v. Wyld*, 32 Beav. 266.



For form of decree directing special enquiry as to damages, see *Middleton v. Greenwood*, 3 N. R. 150.

On an application for an injunction the Court always now requires the plaintiff to give an undertaking as to damages. The undertaking should be inserted in the order for the injunction in these words: "And the plaintiff, by his counsel, undertaking to abide by any order the Court may make as to damages, in case this Court should hereafter be of opinion that the defendant shall have sustained any, by reason of this order which the plaintiff ought to pay." An order directing an inquiry as to damages may be obtained after a decree dismissing the bill," *Newby v. Harrison*, 7 Jur. N. S. 981; *Coy v. Henderson*, Chambers.

#### WILLS AND MATTERS TESTAMENTARY.

41. The Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the court has jurisdiction to try the validity of deeds and other instruments. C. S. U. C. c. 12, s. 28.

The Court has jurisdiction to set aside a will on a proper case, without waiting for a revocation of the probate, *Perrin v. Perrin*, 19 Gr. 260; *Wilson v. Wilson*, 24 Gr. 392.

42. The Court shall have jurisdiction in matters testamentary, as provided in the twenty-eighth to thirtieth sections, inclusive, of "*The Surrogate Courts Act*."

The sections of the Surrogate Courts Act (R. S. O., c. 46), referred to in the foregoing section, are as follows:—

28. In every case in which there is contention as to the grant of probate or administration, and the parties in such case thereto agree, such contention shall be referred to and determined by either of Her Majesty's Superior Courts of Law or by the Court of Chancery on a case to be prepared, and the Surrogate Court, having jurisdiction in such matter shall not grant probate or administration until such contention be terminated and disposed of by judgment, decree or otherwise.

29. Any cause or proceeding in the said Surrogate Courts in which any contention arises as to the grant of probate or administration, or in which any disputed question may be raised (as to law or facts), relating to matters and causes testamentary, shall be removable by any party to such cause or proceeding into the Court of Chancery by order of a Judge of the said Court, to be obtained on a summary application supported by affidavit, of which reasonable notice shall be given to the other parties concerned.

(2) The Judge making such an order may impose such terms as to payment or security for costs or otherwise as to him may seem fit; but no cause or proceeding shall be so removed unless it be of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the Court of Chancery, nor unless the personal estate of the deceased exceeds two thousand dollars in value.

30. Upon any cause or proceeding being so removed as aforesaid, the Court of Chancery shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same as with any cause or claim originally entered in the said Court of Chancery; and the final order or decree made by the said Court of Chancery in any cause or proceeding removed as aforesaid, shall, for the guidance of the said Surrogate Court, be transmitted by the Surrogate Clerk to the Registrar of the Surrogate Court from which such cause or proceeding was removed.

**43.** The Court shall have jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when decreed shall continue until the further order of the Court. C. S. U. C. c. 12, s. 29.

Although in England the mere fact of desertion by the husband, will not entitle the wife to a decree for alimony; still, as in this country, the Court cannot decree restitution of conjugal rights, desertion would be sufficient to warrant a decree for alimony, and desertion coupled with other acts of cruelty forms a material ingredient in determining a wife's right to relief, *Severn v. Severn*, 3 Gr. 431. And see as to cruelty, *Jackson v. Jackson*, 8 Gr. 499.

The right of a wife is to reside with her husband in his home, or in the joint home of both, where, therefore, the husband residing at home compelled his wife to live apart in lodgings, the Court, although no violence or other ill-treatment was shewn, made a decree for alimony; and that although the husband had been in the habit of visiting and remaining with his wife, *Weir v. Weir*, 10 Gr. 565.

When it appeared that the plaintiff's absence from her husband's residence was voluntary, and caused chiefly by her own violent temper, and the husband was still willing to receive and support her, the bill was dismissed, *McKay v. McKay*, 6 Gr. 380. And see as to an offer or willingness on the wife's part to return not being alleged, *Edwards v. Edwards*, 20 Gr. 392.

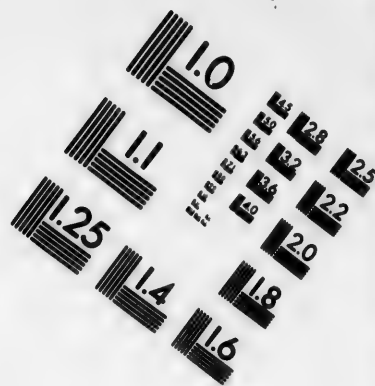
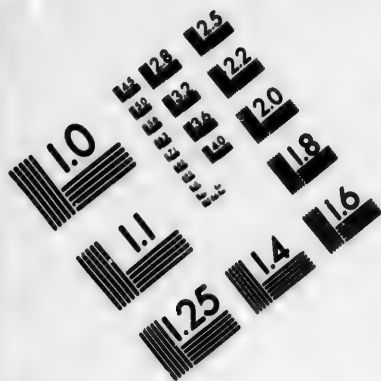
The bill should allege that the husband has refused to receive his wife; it is not sufficient to allege merely that they are living apart, *Walsh v. Walsh*, 1 Ch. Ch. R. 234, where it is desired to give evidence of various acts of violence by the husband, it is necessary to set forth such acts specifically in the bill, in order that the husband may have notice of the acts charged against him, and if he can adduce evidence in rebuttal or explanation, *Rodman v. Rodman*, 20 Gr. 428.

The Court refused to make a consent decree for alimony, *Gracey v. Gracey*, 17 Gr. 113; or to decree by consent payment of a gross sum in lieu of alimony, *Hagarty v. Hagarty*, 11 Gr. 562. But these cases cannot now be relied on as authorities, V.-C. Strong having, in *Henderson v. Buskin* (May, 1873), see 13 L. J. N. S. 337, expressed an opinion altogether at variance with these cases. The cases upon which the learned Vice-Chancellor based his judgment in *Henderson v. Buskin*, were *Hunt v. Hunt*, 4 D. F. & J. 221; *Wilson v. Wilson*, 1 H. L. C. 538; S. C., 5 H. L. C. 40; *Williams v. Bailey*, L. R. 2 Eq. 731; *Rowby v. Rowby*, L. R. 1. Sc. App. 63. Although most of these cases are prior in date to *Hagarty v. Hagarty* and *Gracey v. Gracey* they do not seem to have been brought to the attention of the Court when these were argued.

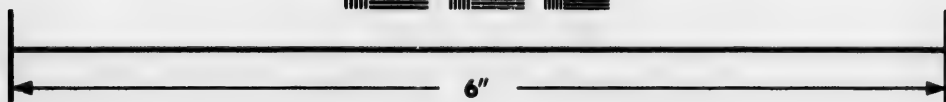
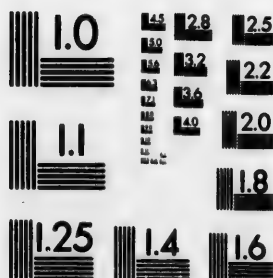
On a bill for alimony and the custody of children under twelve, the Court can grant the latter relief without a petition being filed, *Munro v. Munro*, 15 Gr. 431.

A husband, against whom his wife has obtained a decree for alimony on the ground of desertion, is not entitled, as of right, to have the decree vacated or suspended, on his afterwards offering to receive and maintain her, *Cronk v. Cronk*, 19 Gr. 283. Where the plaintiff after an order for interim alimony had been made, returned to her husband's house and resided there for some time, but afterwards left on account of his cruelty, a motion to set aside the interim order on the ground of condonation was refused, *Maxwell v. Maxwell*, 1 Ch. Ch. R. 27.

After a decree had been made, and alimony paid for several years under it, the Court entertained a petition by the husband to be relieved from the decree, and granted the relief sought on the ground of the wife's subsequent adultery, *Severn v. Severn*, 14 Gr. 150.



# IMAGE EVALUATION TEST TARGET (MT-3)



Photographic  
Sciences  
Corporation

23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4503

2.8  
2.5  
2.2  
2.0  
1.8

10  
01

In fixing the amount of alimony to be paid, the husband's income is the proper guide, *Severn v. Severn*, 7 Gr. 109; but see *McCulloch v. McCulloch*, 10 Gr. 320, where the question of how far the rule of allowing one-third of the husband's income is applicable to this country was considered. The Court will in a proper case grant interim alimony, *pendente lite*, *Soules v. Soules*, 3 Gr. 113; but where the parties had been living apart for four years, and the wife did not allege she was in want, while the husband swore she was better off than he was, an order was refused, *Bradley v. Bradley*, 3 Ch. Ch. R. 329; and see *Smith v. Smith*, 6 Prac. R. 51.

On an application for interim alimony, proof of the marriage is all that is required, *Nolan v. Nolan*, 1 Ch. Ch. R. 368; *Carr v. Carr*, 2 Ch. Ch. R. 71; *Wilson v. Wilson*, 6 Prac. R. 129, and the order will be made although the validity of the marriage is disputed, *McGrath v. McGrath*, 2 Ch. Ch. R. 411; if a marriage *de facto* is proved it is sufficient, *Bradley v. Bradley*, 3 Ch. Ch. R. 329; but the affidavit as to the marriage should state such particulars as will enable the Court to judge whether it has been duly solemnized or not, *Taylor v. Taylor*, 1 Ch. Ch. R. 234.

The question whether the plaintiff has been guilty of adultery cannot be raised on an application for interim alimony, *Campbell v. Campbell*, 6 Prac. R. 128.

Where interim alimony had not been applied for the Court refused to allow alimony from a date before making the decree, *Soules v. Soules*, 2 Gr. 299.

Interim alimony runs from the time of the service of the bill if there has been no want of diligence on the plaintiff's part in making the application, *Howe v. Howe*, 3 Ch. Ch. R. 494.

An omission to make the indorsement directed by Order 488 to be made upon the office copy of the bill served, does not disentitle the plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion, *Peterson v. Peterson*, 6 Prac. R. 150.

The usual undertaking given by the plaintiff on obtaining the order for interim alimony to proceed to a hearing at the first possible sittings, was extended to the next sittings where the defendant had failed and wilfully refused to pay interim alimony and disbursements which he had been directed to pay, *Bowlaugh v. Bowlaugh*, 6 Prac. R. 200.

**44.** An order or decree for alimony may be registered in any registry office in Ontario, and such registration shall, so long as the order or decree registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the county or counties where such registration is made, and operate thereon for the amount or amounts by such order or decree ordered to be paid in the same manner and with the same effect as the registration of a charge of a life annuity, created by the defendant on his lands would; and such registration may be effected through a certificate of such order or decree by the Registrar of the Court or by the Clerk of Record and Writs or other officer authorized by the Court to sign the same. 28 V. c. 17, s. 4; 39 V. c. 7, s. 51.

Although under this section a certificate of the order for alimony may be registered, a certificate of *its pendens* on filing the bill, cannot be registered, *White v. White*, 6 Prac. R. 208.

**45.** In suits for alimony, the Court or a Judge thereof may, in a proper case, order a writ of arrest to issue at any time after the bill has been filed, and shall, in the order, fix the

amount of bail to be given by the defendant, in order to procure his discharge. C. S. U. C. c. 24, s. 9. *Vide Rev. Stat. c. 64, s. 11.*

As to the amount of bail on issuing a writ of *ne exeat provincia*, under 20 Vict., c. 58, s. 3, in a suit for alimony, see *Harn v. Harn*, 4 U. C. L. J. 261.

The writ of *ne exeat*, granted after filing a bill in an alimony suit, remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife, *Macdonald v. Macdonald*, 5 U. C. L. J. 66. On a motion to discharge defendant from arrest under a writ of arrest, the Court will look into the merits of the case so far as to enable it to judge whether the plaintiff can reasonably expect to succeed in her case, and if not, or if defendant displace the *prima facie* case made by her on obtaining the writ, he will be discharged, *Macpherson v. Macpherson*, 2 Ch. Ch. R. 222.

As to retaining funds of defendant and refusing payment to him without his first securing payment of future alimony, see *Gott v. Gott*, 10 Gr. 543.

46. In case an order is made for writ of arrest, in a suit for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the Court. C. S. U. C. c. 24, s. 10.

47. In no suit for alimony shall any costs be ordered to be paid *de die in diem* by the defendant, beyond the amount of the cash disbursements properly incurred by the plaintiff's solicitor, 32 V. c. 18, s. 1.

48. In no suit for alimony, in which the plaintiff fails to obtain a decree for alimony, shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly incurred by the plaintiff's solicitor. 32 V. c. 18, s. 2.

A defendant having been directed to pay full costs, the Court on rehearing declined to vary the decree although properly the plaintiff was only entitled to cash disbursements, the parties having acted on the decree, *Keith v. Keith*, 26 Gr. 110.

#### RELIEF AGAINST FORFEITURE FOR BREACH OF COVENANT TO INSURE.

49. The Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as the Court may seem fit. 29 V. c. 28, s. 5.

**50.** The Court, where relief is granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise. 29 V. c. 58, s. 6.

**51.** The two preceding sections shall be applicable in the case of leases for a term of years absolute, or determinable on a life or lives or otherwise, and also in the case of a lease for the life of the lessee or the life or lives of any other person or persons. 29 V. c. 8, s. 9.

#### PARTITION.

**52.** In any suit in the Court of Chancery for partition or sale of the estate of joint tenants, tenants in common or coparceners, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction that, in proceedings under the "*The Partition Act*," it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such suit for the said purposes as might be taken upon a petition under the said Act; and every deed or vesting order made in any such suit shall have the same effect as a deed or vesting order made in proceedings under the said Act. 40. V. c. 8, s. 38.

For the jurisdiction which the Court possesses under "*The Partition Act*," see R. S. O. c. 101.

**53.** In regard to the partition and sale of estates of joint tenants, tenants in common and coparceners, the Court, in addition to the powers which it possesses under "*The Partition Act*," and the preceding section, shall possess the same jurisdiction as by the laws of England on the tenth of August, one thousand eight hundred and fifty, was possessed by the Court of Chancery in England, and also as by the laws in force in Ontario is possessed by the Courts of Queen's Bench and Common Pleas. C. S. U. C. c. 12, s. 45; 32 V. c. 33, s. 43.

The Court will not decree the partition of lands, the title to which is vested in the Crown; neither will it decree the sale of such lands at the instance of the representatives of a deceased locatee, *Abell v. Weir*, 24 Gr. 464; nor is the right which a squatter acquires by being in possession of lands of the Crown such an interest as will be partitioned among his heirs, *Jenkins v. Martin*, 20 Gr. 613.

Where on the hearing of a cause for partition it was shewn that a division of the land would be less beneficial to the owners than a sale, the Court without waiting for any return to that effect, ordered the lands to be sold, *Bennett v. Bennett*, 8 Grant, 446; *Steven v. Hunter*, 14 Gr. 541.



Where a decree, which reserved no further directions, directed that a sale or partition of the property should take place according as the master should consider either course more for the interest of the parties, but contained no directions as to the conveyance or possession, or the execution of deeds, and the master reported in favour of partition; the Court on motion, ordered the execution of conveyances, and the delivery of possession, *O'Lone v. O'Lone*, 2 Grant, 642; and see as to confirmation of report in partition, *Dunn v. Dowling*, 1 Ch. Ch. R. 365.

The fact that there is an outstanding term in lands to portions of which infants are entitled, is no defence to a bill of partition, although it may influence the Court in deciding between a sale or partition of the estate, *Fitzpatrick v. Wilson*, 12 Grant, 440.

In suits between joint owners for partition or sale, the costs are to be borne by the parties in proportion to their respective interests in the property, except that in the case of partition, the Court, if it sees fit, may give no costs to either party up to the hearing, *Cartwright v. Diehl*, 13 Grant, 360; *Bernard v. Jarvis*, 1 Ch. Ch. R. 24.

The costs in partition suits are, as in other suits, party and party costs; and where any of the parties are not *sui juris* costs as between solicitor and client, are not decreed even by consent, *Harkness v. Conway*, 12 Grant, 449; and see *Carroll v. Carroll*, 23 Gr. 438, as to costs of a suit brought in the names of infants for the partition and sale of an estate for the purpose of discharging a mortgage thereon.

If one of several co-tenants create an incumbrance on his undivided share, and institutes proceedings to obtain a partition of the estate, the incumbrancer must be brought before the Court, and the party who created the charge must bear any additional expense occasioned thereby, *McDougall v. McDougall*, 14 Gr. 267.

As to allowance for improvements, see *Foster v. Emerson*, 5 Gr. 135; *Wood v. Wood*, 16 Gr. 471; *Biehn v. Biehn*, 18 Gr. 497; *Hovey v. Ferguson*, 18 Gr. 498.

Where on partition one tenant in common, who has been in possession, makes a claim for improvements, he must account for his occupation, *Rice v. George*, 20 Gr. 221; *Tensdale v. Sanderson*, 33 Beav. 534.

54. In such cases, any decree, order or report by which a partition or sale is declared or effected, or any deed executed by any officer of the Court, or other person appointed by the Court to execute the same, to give effect to such partition or sale, shall have the same effect at Law and in Equity as the record of a return in the Court of Queen's Bench and Common Pleas has in matters of partition, or as Sheriff's deeds now have in other cases. C. S. U. C. c. 12, s. 46; 40 V. c. 7, sched. A (43).

55. Any partition or sale made by the Court shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself. C. S. U. C. c. 12, s. 47; 32 V. c. 33, s. 44.

56. An office copy of the decree, order or report declaring a partition, shall be sufficient evidence in all Courts of the partition declared thereby, and of the several holdings by the parties of the shares thereby allotted to them. C. S. U. C. c. 12, s. 48; 32 V. c. 33, s. 44.

## LUNATICS.

**57.** The word "Lunatic" in the subsequent sections of this Act shall include an Idiot or other person of unsound mind. C. S. U. C. c. 12, s. 32.

The words "lunatic," "idiot," "unsound mind" are the legal terms usually introduced into modern Acts of Parliament to denote mental incapacity. The latter term is that which is most commonly used, as included in the expression "*non compos mentis*," and less open to objection than either of the other terms, *ex parte* Barnsley, 3 Atk. 168; and see *re* McSherry, 10 Gr. 390.

A person whom it was sought to have declared a lunatic was shewn to be in a state of mind described as "senile imbecility":—Held that he might properly be declared a lunatic, *re* Kelly, 6 Pr. R. 220.

**58.** In the case of Lunatics, and their property and estates the jurisdiction of the Court shall include that which in England is conferred upon the Lord Chancellor by a Commission from the Crown, under the Sign Manual. C. S. U. C. c. 12, s. 31.

As to the distinction between the jurisdiction exercised by the Lord Chancellor in Chancery and in Lunacy, see *Murray v. Frank*, 2 Dick. Ch. 555; *Sherwood v. Sanderson*, 19 Ves. 280. For a recent and very important case which illustrates the peculiar nature of the Chancellor's jurisdiction in Lunacy, see *Beall v. Smith*, L. R. 9 Chan. 85.

*Inquisition by Commission.*

**59.** When a Commission has been issued and an inquisition thereupon returned into Court, by which a person is found lunatic, in case any one entitled to traverse the inquisition desires to do so, he may, within three months from the day of the return and filing of the inquisition, present a petition for that purpose to the Court, and the Court shall hear and determine the petition subject to the following provisions.

2. In every order giving effect to such petition, the Court shall limit a time not exceeding six months from the date of the order, within which the person desiring to traverse, and all other proper parties, shall proceed to the trial of the traverse; but the Court may under the special circumstances of any case, and upon a petition being presented for that purpose, and upon the circumstances being substantiated upon affidavit, allow the traverse to be had or tried after the time limited; and in such special case, the Court may make such orders as seem just.

3. The trial may be ordered to take place in any Court of Record in Ontario, or before a Judge of the Court of Chancery

with or without the aid of a jury, according to the circumstances of the case and the situation of the parties. C. S. U. C. c. 12, s. 34 (1-2).

4. The Court may order that the person to traverse, if he is not the party who has been found lunatic, shall, within one month after the date of the order, file, with such officer as the Court may appoint, a bond, with one or more sureties, in favour of the registrar for the time being, and conditioned for all proper parties proceeding to the trial of the traverse within the time limited; such bond before the filing thereof being approved of and certified to be sufficient by the Judge of the County Court of the County in which the parties reside, or by one of the Judges or Masters of the Court of Chancery. C. S. U. C. c. 12, s. 34 (3), 39 V. c. 7, s. 2, *Sch. B.*

5. Every person who does not present his petition, or who neglects to give the security, or who does not proceed to the trial of the traverse, within the times respectively limited therefor, and the heirs, executors and administrators of every such person, and all others claiming through him, shall be absolutely barred of the right of traverse. C. S. U. C. c. 12, s. 34 (4).

*All a traverse to the return of an inquisition finding a person non compos mentis secures a right by law, though the Court is not dissatisfied with the return upon the evidence, ex parte Ferne, 5 Ves. 832; ex parte Wragg, 5 Ves. 450; ex parte Ward, 6 Ves. 579; ex parte Cranmer, 12 Ves. 445; Sherwood v. Sanderson, 19 Ves. 280. A finding of sanity cannot be traversed, Hume v. Burton, 1 Ridg. P. C. 213.*

A party having been found a lunatic under two inquisitions, the Court refused to allow him to traverse the second; but such inquisitions are not conclusive, and may be again questioned in actions at law or by suits in equity, *ex parte Barnsley*, 3 Atk. 184.

A person traversing an inquisition is considered in the nature of a defendant opposing the title found for the Crown, and not in the nature of a plaintiff, *Regina v. Mason*, 2 Salk. 447; *Rex v. Roberts*, 2 Str. 1208.

The alienage of a lunatic, or other person having a title to or interest in his lands, may traverse an inquisition as well as the lunatic himself, and a person who has entered into a contract with a *non compos* for the purchase of any portion of his property, is such an equitable alienage as will give him the right to traverse, *Shelford on Lunacy*, 120.

The Court may, upon petition, quash a commission of lunacy and the inquisition taken under it, without putting the party to the expense and delay of a traverse, *re Milne*, 11 Gr. 153; but where the Judge who granted the commission thought a *prima facie* case of insanity made out, and the jury found the insanity, the Court, though quashing the inquisition, refused to charge the party applying for the commission with costs, *Ibid.* The cost of suing out a commission of lunacy were held to be a debt as against the assets left by the lunatic, though at his death a traverse of the lunacy, leave for which had been obtained on the lunatic's own application, was pending, *re Cumming*, 18 Jur. 181.

60. In case the Court be dissatisfied with the verdict returned upon a traverse, the Court may order a new trial, or

more than one new trial as in other cases. C. S. U. C. c. 12, s. 36.

*Inquisition without Commission.*

**61.** Instead of issuing a Commission of Lunacy, the Court in lieu thereof may, with or without the aid of a jury (which the Court or a Judge thereof may cause to be empanelled as in other cases) hear evidence and inquire into and determine upon the alleged lunacy; but the alleged lunatic shall have a right in such cases to demand that the inquiry be submitted to a jury or the Court may order that the inquiry be had before any Court of Record. 28 V. c. 17, s. 5; *first part*.

Before granting an order declaring a person a lunatic he must be served with notice of the application, and any counsel, or other person he may desire to see in relation to the matter, must be allowed access to him, *re* Miller, 1 Ch. Ch. R. 215. As to the evidence necessary to dispense with such service as dangerous to the lunatic, or useless, see *re* Newman, 2 Ch. Ch. R. 390; *re* Mein, 2 Ch. Ch. R. 429.

An alleged lunatic should receive the same notice of a trial before the Court as of an inquisition under the former practice, *re* McNulty, 13 Gr. 463.

On an application in Lunacy, the Court ordered the Sheriff to empanel a jury for the then next sittings of the Court. The matter was not proceeded with until the sittings succeeding the next, and the matter then coming on, held that the panel was not properly constituted; that the Sheriff's authority to summon a jury was confined to the first sittings after the date of the order, *re* McNulty, 13 Gr. 463.

**62.** Where any such inquiry is had by the Court, with or without the aid of a jury, or before a Court of Record, no traverse shall be allowed, but the Court, if dissatisfied with the finding of a jury, may, at the instance of any party who would be entitled to traverse an inquisition under commission of lunacy, direct a new trial or new trials from time to time upon application therefor made to the Court within three months from the time the verdict is rendered, or such further time as the Court, under special circumstances, may permit, and subject to such directions, and upon such conditions as to the Court may seem proper, and the Court may order any such new trial to be had before the same Court in which the verdict was rendered or before any other Court. 28 V. c. 17, s. 6.

As to traversing, see notes to section 59.

**63.** On every such inquiry, the alleged lunatic, if he be within the jurisdiction of the Court, shall be produced and shall be examined at such times and in such manner either in open Court or privately before the jury shall retire to consult about their verdict, as the presiding Judge may direct, unless the Court ordering such inquiry shall beforehand, by order, have dispensed with such examination. 28 V. c. 17, s. 7.

*Subject of Inquiries Limited.*

**64.** Every inquiry, under a Commission of Lunacy, or before any such Court of Record, shall be confined to the question, whether or not the person who is the subject of inquiry is, at the time of such inquiry, of unsound mind and incapable of managing himself or his affairs, and the verdict rendered by a jury shall, in every case, be returned to the Court, certified by the Judge before whom the inquiry has been had, and shall be final as to the question on such inquiry, unless the same be set aside. 28 V. c. 17, s. 5.

The great object contemplated in all the proceedings is the promotion of the benefit and advantage of the particular individual, *re Dyce, Sombre*, 1 Mac. & G. 116; *Oxenden v. Compton*, 2 Ves. 69. There are cases in which the Court, in the exercise of its discretion, may consider that the proceedings would not tend to this end, though the mental infirmity may be such as fully to support them, Lord Ward's case, 2 M. & K. 54; *Brodie v. Barry*, 2 V. & B. 36; and there are others in which, even from a less degree of mental incapacity, it is necessary for the interests of the individual that he and his property should receive protection, *Gibson v. Jeyes*, 6 Ves. 287; *Ridgeway v. Darwin*, 8 Ves. 66; *re Holmes*, 4 Russ. 182.

*Summary Applications.*

**65.** The Court may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a commission to inquire into the alleged lunacy, except in cases of reasonable doubt; and any person who might traverse an inquisition to the same effect, may move against the order containing the declaration, or may appeal therefrom, as the case requires; and the right so to move or appeal shall as to time be subject to the same rules as the right to traverse. C. S. U. C. c. 12, ss. 33 & 35.

A Judge sitting in Chambers had jurisdiction to issue a commission in lunacy, *re Stnart*, 4 Gr. 44; so an application under this section may be to a Judge in Chambers.

An application to declare a person a lunatic without the expense of a commission must be supported by affidavits of more than one medical man, and notice should be given to the lunatic. The fitness of the proposed committee must be shewn on affidavit, *re Patton*, 1 Ch. Ch. R. 192; *re Fleming*, 13 U. C. L. J., N. S. 197; and see *McIntyre v. Kingsley*, 1 Ch. Ch. R. 281.

As to the evidence necessary to dispense with service, see *re Newman*, 2 Ch. Ch. R. 390; *re Mein*, 2 Ch. Ch. R. 429.

*Protection of Property of Lunatics.*

**66.** In order to afford due protection to the property of lunatics, the following provisions shall in every case be observed:

1. The Committee of the estate shall, within six months after being appointed, file in the office of such officer as may

be appointed by the Court for that purpose a true inventory of the whole real and personal estate of the lunatic, stating the income and profits thereof, and setting forth the debts, credits and effects of the lunatic, so far as the same have come to the knowledge of the Committee;

2. If any property belonging to the estate be discovered after the filing of an inventory, the Committee shall file a true account of the same from time to time, as the same is discovered;

3. Every inventory shall be verified by the oath of the Committee; and

4. The Committee of the estate shall give two or more responsible persons as sureties, in double the amount of the personal estate, and of the annual rents and profits of the real estate, for duly accounting for the same once in every year, or oftener if required by the Court, and for filing the inventory aforesaid; and the security shall be taken by bond or recognizance in the name of any officer appointed by the Court for that purpose. in such manner as the Court or a Master thereof may direct, and the same shall be filed in the office of any officer appointed by the Court for that purpose. C. S. U. C. c. 12, s. 37 (1-4); 39 V. c. 7, s. 2, *Sched. B.*

The Court cannot appoint a committee of a lunatic on his giving his own security only, *re Ward*, 2 Ch. Ch. R. 188; but where the personal estate of the lunatic consisted of a mortgage for a large amount which was over due, and the object in getting a committee appointed was to take proceedings to foreclose, the committee was ordered to give security in double the annual income of the real estate, and double the amount likely to be realized from the personal estate, *re Davis*, V. C. Mowat, 25th Feb., 1867.

The committee of the person does not give security and will not be accepted as a surety for the committee of the estate, *re Burton*, *ex parte Mount*, 21 L. J. Chy. 221.

As to the powers, duties, and liabilities of a committee of a lunatic's estate, see *re Shaw*, 15 Gr. 619; and *Elmer's Pr. in Lunacy* 83.

The control of the Court over the estate ceases with the death of the lunatic, so an order for the distribution of the estate of a deceased lunatic cannot be made under the proceedings in Lunacy. Where a lunatic died, the committee took under authority of the Court, proceedings for the administration of the estate by applying for an administration order, which was granted, the proceedings being directed to be as inexpensive as possible, *re Brilling*, 3 Ch. Ch. R. 290; and see *ex parte Clarke*, Jac. 582; *re Barry*, 1 Moll. 414.

The jurisdiction continues, however, to a certain extent from the necessity of the case. Thus the control which the Court has over the committee does not determine by the lunatic's death, but he continues liable to account, and to all the consequences of misconduct on his part, and bound to act in delivering possession of the estate as the Court may direct, *re Fitzgerald*, 2 S. & L. 440. So a receiver of the lunatic's estate may be ordered to continue acting until arrears of rents and profits due at the time of the lunatic's death are paid and satisfied, *ex parte Clarke*, Jac. 589. An order or report may also be made, after the lunatic's death, upon a



proceeding originating prior to it, when such order or report is for the purpose of winding up the Lunacy, *ex parte* Armstrong, 3 Bro. 237, *re* McDougal, 12 Ves. 384; or for enforcing obedience to orders made during the lunatic's lifetime, *ex parte* Roberts, 3 Atk. 308.

The officer of the Court to whom the bond required by the 4th sub-sec. is to be given is the Referee in Chambers, Gen. Ord. 631; and the bond and inventory are to be filed with the Clerk of Records and Writs, Gen. Ord. 632.

**67.** Wherever the personal estate of a lunatic is not sufficient for the discharge of his debts, the following steps may be taken:—

1. The Committee of his estate shall petition for authority to mortgage, lease or sell so much of the real estate as may be necessary for the payment of such debts;

2. Such petition shall set forth the particulars and amount of the estate real and personal of the lunatic, the application made of any personal estate, and an account of the debts and demands against the estate;

3. The Court shall, by one of the Masters or otherwise, inquire into the truth of the representations made in the petition, and hear all parties interested in the real estate;

4. If it appears to the Court that the personal estate is not sufficient for the payment of debts, and that the same has been applied to that purpose as far as the circumstances of the case render proper, the Court may order the real estate or a sufficient portion of it to be mortgaged, leased or sold either by the Committee or otherwise;

5. The Court shall direct the Committee to discharge such debts, out of the money so raised, and the Court may order the Committee to execute conveyances of the estate, and to give security for the due application of the money, and to do such other acts as may be necessary in such manner as the Court may direct; and

6. In the application of any moneys so raised, the debts shall be paid in equal proportion without giving any preference to those which are secured by sealed instruments. C. S. U. C. c. 12, s. 38 (1-6).

When the estate of a lunatic is small, the Court will combine in one reference to the Master all the usual inquiries, although the several objects may be in England, the subject of separate references, *re* Duggan, 2 Gr. 622.

Although the general rule is that no course will be taken that will prejudicially affect the interests or comfort of the lunatic, even for the benefit of creditors, still



the Court will assist creditors where that can be done without prejudice to the lunatic, and where the Court, by its orders, has induced creditors to prove their debts in the matter of the lunacy, and thus prevented them from proceeding at law, *quære*, whether the Court is not bound to afford them relief, even to the prejudice of the lunatic's estate, *re Shaw*, 14 Gr. 524. The Court will exercise a wide discretion as to the disposition of a lunatic's estate, and when it appears to be necessary, will order a sale and disposition and authorize the committee to collect rents, &c., *re Keenan*, 2 Ch. Ch. R. 492.

When the heirs-at-law or next of kin of a lunatic are unknown, or reside at a distance, and service on them would be attended with great expense, the Court may dispense with service upon them of notice of a sale of the real estate, *re McGrath*, 2 Ch. Ch. R. 435. Where there are no kindred, notice of the proceedings should be given to the Attorney-General, *re Early*, 2 Coop. temp. Cottenham 107: *ex parte Watson*, Jac. 161.

**68.** When the personal estate, and the rents, profits and income of the real estate of the lunatic, are insufficient for his maintenance or that of his family, or for the education of his children, an application may be made by the Committee, or by any member of the family of the lunatic, that the Committee be authorized or directed to mortgage or sell the whole or part of the real estate, as may be necessary; upon which the like reference and proceedings shall be had, and a like order made, as for the payment of debts. C. S. U. C. c. 12, s. 39.

**69.** In case of any mortgage, lease or sale being made, the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus which remains of the money raised as he or they would have in the estate, if no mortgage, lease or sale had been made; and such money shall be of the same nature and character as the estate mortgaged, leased or sold; and the Court may make such orders, as are necessary for the due application of the surplus. C. S. U. C. c. 12, s. 40.

One of several heirs of an intestate being a lunatic, an Act of Parliament was obtained authorizing the sale of the intestate's lands, and the investment of the lunatic's share in government securities, or mortgages, for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and in a proceeding to distribute his share, it was held that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives, and not his next of kin, *Campbell v. Campbell*, 19 Gr. 254.

**70.** When a lunatic is seised or possessed of real estate, by way of mortgage, or as a trustee for others in any manner, the Committee may apply to the Court for authority to convey such real estate to the person entitled thereto, in such manner as the Court may direct; and thereupon the like proceedings shall be had as in the case of an application to sell the real estate; and the Court upon hearing all the parties interested may order a conveyance to be made; and on the application, by bill or petition, of any person entitled to a conveyance, the

Committee may be compelled by the Court, after hearing all parties interested, to execute the conveyance. C. S. U. C. c. 12, s. 41.

71. Every conveyance, mortgage, lease and assurance made by the Committee under direction of the Court pursuant to any of the provisions of this Act, shall be as valid as if executed by the lunatic when of sound mind. C. S. U. C. c. 12, s. 42.

72. The Court may Compel the specific performance of any contract made by a lunatic while capable of contracting, and may direct the Committee to execute all necessary conveyances for the purpose; and the purchase money, or so much thereof as remains unpaid shall be paid to the Committee or otherwise as the Court directs. C. S. U. C. c. 12, s. 43.

#### *General Provisions.*

73. Any order by a single Judge in a matter of lunacy, shall be subject to rehearing, and to appeal to the Court of Appeal within the same times and under the same conditions as in other cases in the said Court of Chancery, unless the said Court, or a Judge thereof, otherwise orders. 28 V. c. 17, s. 8.

74. The Court may order the costs, charges and expenses of and incidental to the presentation of any petition for a commission of lunacy or to any inquiry, inquisition, issue, traverse, order, direction, conveyance or other proceeding in lunacy, to be paid either by the party or parties presenting such petition or prosecuting the same, or such inquiry or other proceeding in lunacy, or by the party or parties opposing the same, or out of the estate of the lunatic or alleged lunatic, or partly in one way and partly in another. 28 V. c. 17, s. 9; C. S. U. C. c. 12, s. 44.

#### INFANTS.

75. The Court shall also have jurisdiction respecting the custody of infants in the cases and subject to the provisions mentioned in *The Revised Statute respecting the Custody of Infants*. C. S. U. C. c. 12, s. 49.

See notes to Judicature Act, s. 17, sub-s. 9.

76. Where an infant is seised or possessed of or entitled to any real estate in fee, or for a term of years, or otherwise how-

soever, in Ontario, and the Court is of opinion that a sale, lease or other disposition of the same or of any part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate or any part thereof, to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by any person appointed by the Court for the purpose, in such manner and with such restrictions as to the Court may seem expedient, and may order the infant to convey the estate as the Court thinks proper. C. S. U. C. c. 12, s. 50.

For the mode of proceeding under this section see Ord. 527 *et seq.*

In directing the sale of infants' real estate, the Court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit; the Court will order a sale of a portion of an infant's estate to save the rest when it is made to appear to be for the benefit of the infant, *re McDonald*, 1 Ch. Ch. R. 97.

The Court will not direct a sale of the real estate of an infant merely because the ancestor was indebted; it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit, *re Boddy* 4 Gr. 144; and see *re Barker*, 6 Prac. R. 226.

An application to confirm a sale of an infant's estate was refused where it was not shewn that a sale was necessary for the maintenance of the infant, or that by reason of the property being exposed to waste or dilapidation, or to depreciation from any other cause, the interests of the infant would be promoted by a sale, and where also it appeared that the proceeds of the sale would not produce as large a sum as the property would be rented for if put in a proper state of repair, *re Phelan*, 6 Prac. R. 259.

On applying for the sale of real estate settled upon infants, the mother by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life interest vested in her under the settlement, *re Kennedy*, 1 Ch. Ch. R. 97.

Where the estate of the infant is small, it is usual to advertise for tenders, to save the expense of a sale by auction, *re Hansell*, 1 Ch. Ch. R. 189.

Where a reference is directed to a Master to inquire what would be a proper sum to allow for the maintenance and education of an infant, the order should not contain any authority for the payment, until the report is brought before the Court for approval, *Murphy v. Lamphier*, 12 Gr. 241.

Where an infant's estate had been sold for \$700, an application to invest the proceeds in the purchase of a small farm upon which it was intended that the father of the infant should reside with the infant, was refused, *re Mason*, 3 Ch. Ch. R. 426.

Where a contract for the sale of an infant's estate had been approved of by the Court, it is not necessary for the purpose of obtaining a decree for specific performance, to allege that the sale was a proper one under this statute, *McDonald v. Garrett*, 8 Gr. 290.

On an application under this section for the sanction of the Court to a renewal of a lease made by the infant's ancestor, and containing a covenant for renewal, none of the circumstances under which alone the Court is empowered to act, being alleged, an order was refused, *re Jackes*, 3 U. C. L. J. N. S., 70; such an application can be made under the Imp. Act, 11 Geo. IV. & 1 Wm. IV. c 65, s. 16, *Ibid.*

The guardian of an infant appointed by the Court, without the sanction of the Court, executed a lease for a term of years, during the existence of which the infant died, and an application having been made for the tenant to deliver up possession he was ordered to do so, and on payment into Court of the arrears of rent, he was permitted to remove the buildings and erections put by him upon the property, doing no damage to the freehold, but the Court refused to make him any allowance out of the rents, for improvements made by him on the property, *Townslay v. Neil*, 10 Gr. 72.

**77.** But no sale, lease or other disposition shall be made against the provisions of any will or conveyance by which the estate has been devised or granted to the infant or for his use. C. S. U. C. c. 12, s. 51.

Where property was devised by a testator to his widow for the maintenance of his family, until the youngest child should come of age, and then to one of his sons charged with certain payments to his widow and the children, with a provision for the substitution of another son in the event of the devisee dying under age or without issue, it was held that the Court had no jurisdiction to order a sale or mortgage of such property, and that such property was not the property of the infants within the meaning of the Act, *re Callicott*, 1 Ch. Ch. R. 182; and see also *re Smith*, 6 Prac. R. 282.

As to the power of the Court to order leases of infants' lands, unless the infant is indefeasibly seised in fee or in tail in possession, see *ex parte Evans*, 2 M. & K. 318; *ex parte Legh*, 15 Sim. 446; *re Clark*, L. R. 1 Ch. App. 292.

**78.** The application shall be in the name of the infant by his next friend, or by his guardian; but shall not be made without the consent of the infant if he is of the age of fourteen years or upwards. C. S. U. C. c. 12, s. 52; 40 V. c. 7, sched. A (47).

The examination of the infant as to his consent, taken under order 532, must be annexed to the petition. A certificate of the master stating that the infants have been examined by him, and that they consent, is insufficient, *re Axford*, 6 Prac. R. 192.

**79.** Where the Court deems it convenient that a conveyance should be executed by some person in the place of an infant, the Court may direct some other person in the place of the infant to convey the estate. C. S. U. C. c. 12, s. 53.

**80.** Every such conveyance whether executed by the infant or some person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. C. S. U. C. c. 12, s. 54.

**81.** The moneys arising from any such sale, lease or other disposition, shall be laid out, applied and disposed of in such manner as the Court directs. C. S. U. C. c. 12, s. 55.

See notes to section 76.

**82.** On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of if no sale or other disposition had been made thereof. C. S. U. C. c. 12, s. 56.

See note to section 69.

**83.** If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower any gross sum which the Court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the Court may direct the payment of such sum in gross or the investment of such other sum, out of the proceeds of the sale of the real estate of the infant. C. S. U. C. c. 12, s. 57.

**84.** The Court shall also have power to remove testamentary guardians and trustees for the same causes as it has power to remove other guardians and trustees, 40 V. c. 8, s. 31 (3).

As to the removal of trustees by the Court, see Lewin on Trusts (7th ed.) 718, 724; Hill on Trustees (2nd ed.) 191.

#### SETTLED ESTATES.—SPECIAL CASES.

**85.** The Court shall have the same jurisdiction as the Court of Chancery in England had on the eighteenth day of March, 1867, in regard to leases and sales of settled estates, and in regard to enabling infants, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or otherwise, concur therein. 28 V. c. 17, s. 1.

The jurisdiction exercised by the Court of Chancery in England, in regard to leases and sales of settled estates, is regulated by the Imp. Acts 19 & 20 Vic. c. 120; 21 & 22 Vic. c. 77; 25 & 26 Vic. c. 108; & 28 Vic. c. 45.

As to what are settled estates within the meaning of these Acts, see *re Laing's Settled Estates*, L. R. 1 Eq. 416; *re Greene*, 10 Jur. N. S. 1098; *re Bardin's Will*, 7 W. R. 711; *re Clark*, L. R. 1 Ch. App. 292.

As to the mode of applying to the Court and the parties who may do so, see *Harvey v. Clark*, 25 Beav. 7; *Williams v. Williams*, 9 W. R. 888; *re Thompson's Settled Estates*, Johns. 418; *re Goodwin's Settled Estates*, 3 Giff. 620.

As to appointment of guardians for infants who may be interested, *re* Longstaffe's Settled Estates, 1 Dr. & S. 142; *re* Hargreaves' Settled Estates, 7 W. R. 156; *re* Caddick's Settled Estates, 7 W. R. 334.

As to married women, and consents by them, see *re* Foster's Settled Estates, 24 Beav. 220; 1 D. & J. 386; *re* Lord De Tabley's Settled Estates, 11 W. R. 936; *re* Bendyshe, 3 Jur. N. S. 727.

As to the persons to be served with notice, or whose consent must be obtained, *re* Boughton, 12 W. R. 34; *re* Turbutt, 8 L. T. N. S. 657; *Eyre v. Saunders*, 4 Jur. N. S. 830; *Grey v. Jenkins*, 26 Beav. 351; *re* Potts, 15 W. R. 29; *re* Brown, 11 W. R. 19.

If consent refused, lease cannot be made, however beneficial it might have been to the estate; *re* Merry's Estate, 15 W. R. 307; *re* Hutchinson, 14 W. R. 473; *re* Hurlie's Settled Estate, 2 H. & M. 196; but an order may be made "subject to, and so as not to affect the rights, estate and interest of any person whose consent has been refused or cannot be obtained," *re* Legge, 6 W. R. 20; *re* Parry, 34 Beav. 462; and see *re* Tarbutt, 8 L. T. N. S. 603, where the consent of a lunatic, not so found by inquisition, was dispensed with.

As to re-investment of the proceeds arising from the sale, *Wall v. Hall*, 11 W. R. 298; *re* Sexton Barns' Settled Estate, 10 W. R. 416.

As to costs, see *re* Parby's Settlement, 29 L. T. 72; *re* Marnier, L. R. 3 Eq. 432.

The Imp. Act 18 & 19 Vic. c. 43, is that which enables minors in England to make binding settlements of their real and personal estate on marriage. Under this Act it has been held the Act does not impose on the Court any duty, of enquiring as to the propriety of the marriage, but that it can consider the propriety of the settlement only, *re* Dalton, 3 Sm. & G. 331; 6 D. M. & G. 201; where the lady's portion was considerable the Court referred the whole matter to Chambers, *re* Olive, 11 W. R. 819. The Act extends to post-nuptial settlements, *re* Hoare, 11 W. R. 181; *Powell v. Oakley*, 34 Beav. 575; but the Court cannot approve of a settlement originally made without its concurrence, *re* Fuller, (V. C. Stuart), 1860.

A petition is necessary though a suit is pending, *Pearse v. Marriott*, W. N. (1866) 48.

The jurisdiction of the Court in England, as to special cases depends upon the Imp. Act 13 & 14 Vic. c. 35. By that Act a husband interested in right of his wife in any question, may concur in a special case in his own name and in the name of his wife, where she has no claim to an interest distinct from her husband, and where a married woman has such distinct interest she may concur in her own right, provided her husband concurs also. The Committee of a lunatic must obtain authority from the Court before he can concur.

An application for a guardian *ad litem*, or for a special guardian, on behalf of an infant, for the purpose of concurring in a special case, should be made by motion, *re* Goodfellow, 1 W. R. 446; and need not be by a next friend; and should be supported by an affidavit of the fitness of the proposed guardian, *ex parte* Craig, 15 Jur. 762.

The father of the infant being a party to the special case and having no adverse interest, it was held not necessary to appoint a guardian *ad litem*, *Ellis v. Guitton*, 18 L. T. 269; but the interest of the infant should at the hearing be protected by separate counsel, *Wright v. Woodham*, 17 L. T. 293.

The affidavit should be styled "In the matter of the infant," and "In the matter of the Act," *Star v. Newberry*, 20 Beav. 14; not "In the special case, &c.," *Maddison v. Skein*, 6 L. T. N. S. 20.

A special case may be amended, *Thistlethwaite v. Garnier*, 5 De G. & Sm. 73; where it had been set down for hearing, *Domville v. Lamb*, 9 Hare, app. 55; and even at the hearing, *Bell v. Cade*, 2 J. & H. 122; and it may on abatement be revived, *Wilson v. Whatley*, 1 J. & H. 331; *Ainsworth v. Alman*, 14 Beav. 597.

Generally the Court will only give its opinion on questions of construction, and not bind the rights of parties, *Bailey v. Collett*, 23 L. J. Ch. 230.

As to what the Court will or will not decide on a special case, see *Schroder v. Schroder*, Kay, 578; *Evans v. Saunders*, 1 Drew. 415, 654; *Day v. Day*, 18 Jur.



1013; *Leslie v. Thompson*, 9 Hare, 268; *Wilson v. Bennett*, 20 L. J. Ch. 279; *Edwards v. Milbank*, 4 Drew. 606; *Bell v. Cade*, 2 J. & H. 122; *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 613.

[Secs. 86 and 87 provide for the Court exercising jurisdiction in matters cognizable at Law, transferring suits to a Court of Common Law, and that no objection shall be taken that the plaintiff has a remedy at law.]

#### IN APPEALS UNDER REVISED STATUTE, CHAP. 27.

**88.** The Court shall also have jurisdiction on any appeal from the judgment or decision of the commissioners under *The Act to prevent Trespasses to Public Lands* as provided in said Act; and the Court may revise, alter, affirm, or annul, such decision or order further inquiry, or direct an issue to be tried at law or before the said Court of Chancery, or a Judge thereof, with the assistance of a jury, and may make such order respecting costs and other matters as seems reasonable and just; and the decree of the Court on the appeal shall be conclusive on the party appealing and on the commissioners. C. S. U. C. c. 12, s. 16; see also Rev. Stat. c. 27, s. 19.

#### REGISTRATION.

**89.** Certificates of Chancery proceedings for registration may be signed by the registrar of the Court, or by the clerk of Records and Writs, or by any other official authorized by the Court to sign the same. 37 V. c. 8, s. 51.

**90.** The filing of a bill or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question, shall not be deemed notice of the bill or proceeding to any person not being a party thereto, until a certificate signed by one of the officers in the preceding section mentioned, or by a deputy registrar of the Court, has been registered in the registry office of the county in which the land is situate, which certificate may be in the following form:—

“I certify that in a suit or proceeding in Chancery between A. B., of  
and C. D. of some title or interest is called in  
question in the following land (*describing it*).”  
Dated at (*stating date and place*).

But no certificate shall be required to be registered in any suit or proceeding for foreclosure or sale upon a registered mortgage. C. S. U. C. c. 12, s. 64; 31 V. c. 20, s. 57.

When a certificate of *lis pendens* has been registered, and the bill is afterwards dismissed, it is not necessary to obtain an order discharging the certificate from the registry. The registration of the decree dismissing the bill is sufficient for all purposes, *Dexter v. Cosford*, 1 Ch. Ch. R. 22.



91. Every decree affecting land may be registered in the registry office of the county or registration division where the land is situate, on a certificate signed by one of the officers in section eighty-nine mentioned, setting forth the substance and effect of the decree, and the land affected thereby. C. S. U. C. c. 12, s. 65.

[Sections 92 to 96 relate to the service of proceedings, see Judicature Act, O. VI., VII.]

#### SECURITY FOR COSTS.

97. In addition to any cases in which a defendant in any suit is now entitled to obtain security for costs from a plaintiff, security for costs may be granted to the defendant or applicant in any suit or proceeding in which it is made to appear satisfactorily to the Court in which such suit or proceeding has been instituted or taken, or to any Judge in Chambers, that the plaintiff has brought a former suit or proceeding for the same cause which is pending either in Ontario or in any other country, or that he has judgment or rule or order passed against him in such suit or proceeding, with costs, and that such costs have not been paid, and such Court or Judge may thereupon make such order staying the proceedings until security be given as to such Court or Judge shall seem meet. 29-30 V., c. 42, s. 1.

As to security for costs generally, see Judicature Act, O. L., r. 4.

The plaintiff was non-suited in an action against the sureties of A. Whilst this suit was pending the same plaintiff sued A. — Held, that A. was entitled to security for costs, *Elliot v. Pinkerton*, 4 Pr. R. 86.

The mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security, if the costs of the first action have been paid, and the second action brought in good faith, *Armstrong v. Montgomery*, 5 Pr. R. 461. On an application for security for costs under R. S. O., c. 51, s. 73, the fact of the costs of the former unsuccessful actions having been paid is not a ground for refusing to make an order, *Chambers v. Unger*, 6 Pr. R. 101. To bring a case within this section (sec. 97) of the Statute, requiring security to be given where another action for the same cause is pending, it must be clearly shewn that the causes of action are identically the same, and not merely growing out of the transaction, *Dean v. Lamprey*, 2 Ch. Ch. R. 202.

A former suit, brought by a married woman in her own name for redemption of lands, in which she claimed an estate for life and in which the bill had been dismissed with costs, to be paid by the next friend of the plaintiff, was considered substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of that suit, *Redman v. Browncombe*, 9 U. C. L. J. N. S. 192; a stay of proceedings until the costs of the former suit were paid, was refused, there being a distinction in this respect between a suit by a married woman and a suit by a person *sui juris*, *Ibid.*

The plaintiff (the vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a *fi. fa.* goods to recover the costs, which was returned *nulla bona*. Afterwards the vendor filed his bill in Equity to enforce specific performance of the contract. On motion of the defendant in the suit, proceedings in Equity were stayed till security for the costs at law should be given, *Follis v. Todd*, 1 Ch. Ch. R. 288.

**98.** If any suit is brought in the Court of Chancery for any cause of action for which any suit or action has been brought and is pending between the same parties and their representatives in any place or county out of Ontario, the Court or any Judge thereof may make an order to stay all proceedings in the Court of Chancery until satisfactory proof is offered to the Court or Judge that the suit or action so brought in such other place or country out of Ontario is determined or discontinued. 29-30 V. c. 42, s. 4.

[Sec. 99 provides for the trial of issues out of Chancery without feigned issues at law, or by the Court or a Judge. Sec. 100 provides for witnesses being examined *viva voce*.]

#### VESTING ORDERS.

**101.** In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may make an order or a decree vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order or decree shall have the same effect both at Law and in Equity as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, to the same estate or interest, to the person in whom the same was ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person. C. S. U. C. c. 12, s. 63.

The Court can make a vesting order in those cases only in which it has authority to order the execution of a deed, conveyance, transfer or assignment of any property. So where the plaintiff in a mortgage suit for sale has leave to bid, and becomes the purchaser, the Court cannot make an order vesting the property in him, inasmuch as he is the person who, in the event of a third person having become the purchaser, would have had to execute the conveyance; the mortgagor or his heirs not being proper parties to such a conveyance, *Ross v. Steele*, 1 Ch. Ch. R. 94; *re Williams*, 21 L. J. N. S. Ch. 437; *Bowen v. Fox*, 1 Ch. Ch. R. 387.

A party purchasing under a decree of the Court, has a right to call for evidence, shewing that persons whose interests were intended to be disposed of, were alive at the time of such sale, before accepting title by means of a vesting order, *Slater v. Fiske*, 1 Ch. Ch. R. 1.

#### COSTS IN ABATED SUITS.

**102.** Wherever any decree or order has been made for payment of costs in any suit, and the suit afterwards becomes abated, any person interested under the decree or order may

revive the suit, and thereupon prosecute and enforce the decree or order, and so from time to time, so often as any abatement happens. 40 V. c. 8. s. 19.

Before this statute the general rule was that there could be no revivor for costs after an abatement by death, *Morgan v. Scudamore*, 2 Ves. 313; *Andrews v. Lockwood*, 15 Sim. 153; whether the abatement be caused by the death of the party to pay or the party to receive the costs, *Jupp v. Geering*, 5 Mad. 375; nor is this rule affected by the fact of the defendants being a corporate body, *Umpelby v. Waveney Valley Railway Co.* 1 J. & H. 254; nor the fact that the bill specially prays costs, *Ibid*; nor that the party who has died without paying costs was one of several defendants, *Bowyer v. Beamish*, 2 J. & L. 238.

Where the party to whom costs were payable died before taxation, the Court (the suit not having been revived) refused with costs a motion that the Master might proceed with the taxation, *Robertson v. Southgate*, 7 Hare, 109; but the survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed, and paid by the plaintiffs, are entitled to proceed with the taxation of their costs, notwithstanding the death of one of such defendants, without a revivor of the suit, and although the surviving defendants and the deceased, in his life time, had carried in a joint bill of costs for taxation, *Hunter, v. Daniel*, 7 Hare, 281; but see *Malins v. Greenway*, 7 Hare, 391.

The exceptions to this rule were: (1) Where the costs have been taxed, *Lowten v. Mayor of Colchester*, 2 Mer. 113; overruling *Glenham v. Stutwell*, 1 Dick. 14; or the taxation has been postponed on an undertaking that the postponement shall be without prejudice, *Tucker v. Wilkins*, 7 Sim. 349. (2) Where some obligation imposed on the party liable for costs remains to be executed, *Bowyer v. Beamish*, 2 J. & L. 240; *Johnson v. Peck*, 2 Ves. Sen. 465. (3) Where the costs are ordered to be paid by the estate, *Jenour v. Jenour*, 10 Ves. 562; or out of a particular fund, *Kemp v. Mackrell*, 2 Ves. Sen. 579. (4) Where the costs are ordered to be paid by an officer of the Court, e.g., by a receiver, *Betagh v. Concanon*, LL. & G. temp. Plunket, 355.

#### LOWER SCALE COSTS.

**103.** In any suit or proceeding, which, before the nineteenth day of December, 1868, might have been brought, instituted or carried on under the equity jurisdiction of the County Courts, and which may now be brought or carried on in the Court of Chancery, the stamps required, and the fees, costs and charges payable in respect thereof, shall be on a scale bearing, as far as practicable, the same proportion to the stamps, fees, costs and charges payable in other suits or proceedings in the said Court of Chancery, as the stamps, fees, costs and charges in actions in County Courts bear to the stamps, fees, costs and charges in actions in the Superior Courts of Common Law; and it shall be lawful for the Judges of the said Court of Chancery to prepare a table of fees, costs and charges applicable to all such proceedings. 32 V. c. 6, s. 4 (2). See Rev. Stat. c. 49, ss. 45 and 47.

[Sec. 104 related to the Suitor's Fee Fund and was repealed by 41 Vic. c. 8, s. 5. Sec. 105 provided for the collection of certain fees by stamps.]

## An Act respecting Attorneys-at-Law.

(R. S. O., Cap. CXL.)

[The sections of this Act, 1 to 30 inclusive, relate to the persons who may be admitted and enrolled as attorneys and solicitors; the service of articulated clerks; the conditions of admission, examinations, fees, and annual certificates.]

**31.** Whenever any attorney or solicitor is struck off the Roll of any of the said Courts, the Clerk of the Crown or Registrar of such Court shall certify the same under his hand and the seal of the Court to the Secretary of the Law Society, stating whether such attorney or solicitor was struck off at his own request or otherwise, and the Secretary shall attach such certificate to the certified copy of the Roll on which the name of such person stands, and shall, in the book to be by him kept as aforesaid, make a note opposite the name of such person of his having been struck off such Roll. C. S. U. C. c. 35, s. 52.

The Courts referred to are: the Courts of Queen's Bench, Chancery and Common Pleas.

The proper proceeding against an attorney for mere non-payment of money, pursuant to a rule of Court, where there are no special circumstances shewing fraud or dishonesty is by judgment and execution under C. S. U. C. c. 24, s. 15 (R. S. O., c. 67, s. 12), and not by motion to strike him off the rolls, nor by attachment, *re* Campbell, 32 U. C. R. 444. The Court will not attach an attorney for not paying over money received by him as an agent, and not in his professional character; but if from the circumstances, it appear that he is not trustworthy, he may be struck off the roll, *re* Hamilton O'Reilly, 1 U. C. R. 392; and see *Taylor v. A. & B.*, 1 L. J. N. S. 300.

As to proceedings against attorneys to compel payment of moneys, see in *re* Harrison *v. A. & B.*, 6 U. C. L. J., 91; *re* Carroll, 2 Ch. Ch. R. 323; *re* Walker, *Ibid.* 324; *re* Toms & Moore, 3 Ch. Ch. R. 41.

The Court will not proceed summarily on a complaint of matters for which (if the charge were true) the attorney might be indicted, on the ground that no one should be compelled to criminate himself or incur a contempt, *Stephens v. Hill*, 10 M. & W. 28; *Anon.*, 12 W. R. 311; especially where the affidavits are contradictory, *re* Patterson *v. Miller*, 1 U. C. R. 256; but recently the Court refused to recognize the distinction, and ordered the solicitor to answer the matters, leaving him to plead privilege by way of evading the contempt if he thought fit, *Anon.*, 17 Sol. Jour. Q. B. 269. The jurisdiction of the Court is not limited to cases where the misconduct is professional in character, but extends to cases where the solicitor's conduct is such as to render him unfit to continue to be an officer of the Court, *Rex v. Southerton*, 6 East 126, 143; *re* King, 8 Q. B. 129; *re* Hall, 4 W. R. 686; *re* Blake, 3 El. & El. 34.

The Referee in Chambers has no power to exercise summary jurisdiction over solicitors; such jurisdiction can only be exercised on an application to the Court, *re* L. & M. solicitors, 6 Fr. R. 21.

In Chancery the General Orders on this subject are as follows:—

Ord. 50. Where a solicitor is struck off the roll of solicitors, or prohibited from practising as a solicitor, for malpractice or misconduct as a solicitor, or other sufficient cause, the Registrar is forthwith to certify under the seal of this Court, such dismissal or prohibition, and the grounds thereof expressed in general terms, and transmit such certificate to each of the Superior Courts of Ontario. (6th Feb. 1854.)

Ord. 51. This Court, on receipt of a similar certificate from the Court of Queen's Bench, or Court of Common Pleas, of any attorney of either of the said Courts respectively, having been struck off the roll of such Court, or prohibited from practising therein, will thereupon take proceedings for striking such person, being a solicitor of this Court from the roll of solicitors; or for prohibiting his practising therein, according to the course and practice, and in like manner and under like circumstances, observed in similar cases in the Superior Courts in England. (6th Feb., 1854.)

Ord. 52. Where a case appears, justifying or requiring by the practice hitherto, an order against a solicitor that he be struck off the roll of solicitors, unless he shall before a time therein limited, shew unto the Court good cause to the contrary, it shall be competent for the Court in lieu thereof to issue an order calling upon the solicitor to answer the matters appearing on affidavit or otherwise.

The Rules in the Common Law Courts are similar to G. O. Chy. 50, 51. See Reg. Gen. as to Attorneys, Harr., C. L. P. A., p. 617.

A certificate of the clerk of the Court, on which an application is made to have the Attorney struck off the roll in another Court, should shew the ground on which he was struck off, and the application should be for a rule to shew cause, in *re Tremayne*, 14 C. P. 267.

The Court will, *sua sponte*, where the circumstances appear to warrant it, take notice of the conduct of its solicitors, and investigate matters in which their acts seem open to suspicion, in *re Toms*, 3 Ch. Ch. R. 204; an attorney called upon to answer affidavits charging him with untrue statements as to disbursements for payments to and procuring money for witnesses, in *re S.*, an Attorney, 14 C. P. 323. Upon an application to compel attorneys to deliver a bill of payments and charges in relation to a certain lot of land, and to answer the affidavits filed in support of the rule, it appeared that there was no retainer of the attorneys or either of them, as such:—Held that the Court, therefore, could not grant the first part of the rule, and that courts will not call upon attorneys to answer affidavits upon an application such as this, the course to be pursued being to dispose of that which relates to the suit, and then, if the circumstances warrant it, to move to strike the attorney off the roll, in *re Keys and Smith & Henderson*, 13 C. P. 262.

For the mode of proceeding before Order 52 was passed, see *Goodwin v. Gosnell*, 2 Coll. 457, 462; *Wheatley v. Bastow*, *re Collins*, 7 D. M. & G. 261, 558; *Thorndike v. Hunt*, 5 Jur. N. S. 879, 882; *re Martin*, 6 Beav. 397; *re Chandler*, 22 Beav. 253; *re Hall*, 2 Jur. N. S. 633.

# ATTORNEYS' COSTS.

32. No suit at Law or in Equity shall be brought for the recovery of fees, charges or disbursements, for business done by any attorney or solicitor as such, until one month after a bill thereof, subscribed with the proper hand of such attorney or solicitor, his executor, administrator or assignee (or, in the case of a partnership, by one of the partners, either with his own name, or with the name or style of such partnership), has been delivered to the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, or been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill. C. S. U. C. c. 35, s. 27.

The Act should be construed liberally for the client, *Williams v. Griffiths*, 10 M. & W. 125; *Engleheart v. Moore*, 15 M. & W. 548.

As to whether Courts of Equity have, independently of statute, jurisdiction to order taxation of bills of costs, see *ex parte Arrowsmith* 13 Ves. 124; *ex parte Lord Cardross*, 5 M. & W. 545; *Cowdell v. Neale*, 1 C. B. N. S. 332; *re Forsyth*, 34 Beav. 140; 13 W. R. 932.

In this Province "month" was held to mean a lunar, not a calendar month, *Berry v. Andrews*, 3 O. S. 645; but in England it was held to mean a calendar month, *Ryall v. Regina*, 12 Jur. 458. See now The Interpretation Act, R. S. O., c. 1, s. 8, sub-s. 15.

The month is to be computed exclusive of the days on which the bill is delivered and the action brought, *Blunt v. Heslop*, 8 Ad. & E. 577; *re Morphy & Kerr*, 2 Ch. Ch. R. 56; but see *Berry v. Andrews supra*.

Where three attorneys composing a firm commenced an action upon a bill of costs, signed by only one of them, it was held insufficient, *Sullivan v. Bridges*, 5 U. C. R. 322. An assignee in bankruptcy is an assignee within the meaning of the Act, *re Walton*, 4 K. & J. 78.

As to what constitutes delivery, see *Welsh v. Silwell*, 11 Jur. 471; *Flower v. Newton*, 11 Jur. 875; *Eggington v. Cumberlege*, 11 Jur. 932; *Blandy v. De Burgh*, 6 C. B. 623; *Gridley v. Austen*, 16 Q. B. 504; *Phipps v. Daubeney*, 16 Q. B. 514; *Spier v. Bernard*, 8 L. T. N. S. 396; in the case of a public officer, *Champ v. Stokes*, 6 H. & N. 683; and in that of the committee of a public company, *Edwards v. Lawless*, 5 Rail. Ca. 357; *Mant v. Smith*, 4 H. & N. 324. Delivery to a duly authorized agent of the client is sufficient, *re Bush*, 8 Beav. 66; or to his servant, *McGregor v. Keiley*, 3 Exch. 794; but not to his solicitor, nor to a friend or relation, *re Abbott*, 4 L. T. N. S. 576; *Gridley v. Austen*, 16 Q. B. 504, 511. Where the action was brought against the executors of the client, delivery to the client in his lifetime was considered enough, *Reynolds v. Caswell*, 4 Taunt. 193; *Tate v. Hichins*, 7 C. B. 875.

Service of the bill upon one of several clients acting in conjunction by the same solicitor, but not copartners, is sufficient service on all, *re Morphy & Kerr*, 2 Ch. Ch. R. 82. A defendant is entitled to a copy of the bill according to the statute, even though he may have admitted the amount to be due, *Dempsey v. Winstanley*, 5 U. C. R. 317; the attorney must prove delivery of his bill, although the defendant has suffered judgment by default, *Ridout v. Brown*, 4 O. S. 74.

Non-delivery of the bill is not a plea to the merits; judgment for the defendant is therefore no bar to a second action, *Dempsey v. Winstanley*, 6 U. C. R. 409; and see *Eccles v. Johnson*, 1 C. L. Ch. R. 93; *Flower v. Newton*, 11 Jur. 875; *Lane v. Glenny*, 7 Ad. & E. 83; *Tate v. Hichins*, 7 C. B. 875.

The bill must be left, not shewn merely, *Crowder v. Shee*, 1 Camp. 437; *Phipps v. Daubeney*, 16 Q. B. 514; and it may be sent by post, *Roberts v. Lucas*, 11 Exch. 41; *Taylor v. Hodgson*, 3 D. & L. 115. The bill, or some accompanying document must specify the persons to be charged, *Taylor v. Hodgson*, 3 D. & L. 115; *Roberts v. Lucas*, 11 Exch. 41; *Gridley v. Austen*, 16 Q. B. 504; *Champ v. Stokes*, 6 H. & N. 683; the Court in which the business was done, *Lewis v. Primrose*, 6 Q. B. 265; *Dimes v. Wright*, 8 C. B. 831; the name of the cause, *Keene v. Ward*, 13 Q. B. 515; and the particular items charged for, *Drew v. Clifford*, 2 Car. & P., 69; *re Smith*, 4 Beav. 309; *re Pender*, 10 Beav. 390; *Stanton & Warren v. McLean*, 9 U. C. L. J. 301.

It is sufficient, as a general rule, if the bill gives such information as will enable the client to obtain advice as to taxation, *Frowd v. Stillard*, 4 Car. & P. 51; *Sargent v. Gannon*, 7 C. B. 742; *Cook v. Gillard*, 1 El. & Bl. 26; *Haign v. Ousey*, 7 El. & Bl. 578.

An attorney may set off a bill before delivery, *Lester v. Lazarus*, 2 C. M. & R. 665; or prove in bankruptcy, *ex parte Prideaux*, 1 Gl. & Jam. 28; *ex parte Steele*, 16 Ves. 161; or sue on a promissory note or other collateral agreement, *Jeffreys v. Evans*, 14 M. & W. 210; *Thomas v. Cross*, 13 W. R. 166. See, in the latter case, comments on *Wangh v. Waddell*, 16 Beav. 521.

The summary jurisdiction does not exclude the right of a client to file a bill against his solicitor for an account, *Morgan v. Higgins*, 5 Jur. N. S. 236; *O'Brien v. Lewis*, 9 Jur. N. S. 321; or to enforce an agreement for delivery by petition, *re Bailey*, 34 Beav. 392.



After taxation, an action by the solicitor is a contempt, *re Campbell*, 3 D. M. & G. 585.

An attorney may be ordered to deliver his bill, though it has been fully settled, and to give credit therewith for all moneys received, in *re Francis v. Houlton*, 6 U. C. L. J. 20; and although the services were not in whole or in part for business done in Court, *re O'Donohoe & Warmoll*, 4 Pr. R. 266.

**33.** Upon the application of the party chargeable by such bill within such month any of the Superior Courts of Law or Equity or any Judge thereof, or any Judge of a County Court shall, without money being brought into Court, refer the bill and the demand thereon to be taxed by the proper officer of any of the Courts in the County in which any of the business charged for in such bill was done, and the Court or Judge making such reference shall restrain the bringing any suit for such demand pending the reference. 34 V. c. 13, s. 13.

The common order to tax may be obtained on præcipe; it is not necessary to apply in Chambers, *re Daniel*, 1 Ch. Ch. R. 224; but if the bill has been delivered more than a month the client must obtain an order in Chambers, *re Boulton*, 2 Ch. Ch. R. 58; if a special order is required notice must be given, *re Atkinson v. Pegley*, 1 Ch. Ch. R. 187. An order to tax will not be granted *ex parte* to the solicitor where there appear to be any facts in dispute between him and the client, in *re Fitch*, 2 Ch. Ch. R. 288; the application must be made in the matter of the solicitor, *Duggan v. Cotton*, 3 U. C. L. J. 15.

As to the party chargeable see notes to Sec. 43.

A party in contempt may apply for taxation, *Newton v. Ricketts*, 11 Beav. 67. A married woman who has separate estate, which she has by agreement made liable, is a party chargeable within the Act, *Waugh v. Waddell*, 16 Beav. 521; *Murray v. Barlee*, 3 M. & K. 209; but see *re Pugh*, 17 Beav. 336; so is the next friend of an infant, *re Fluker*, 20 Beav. 143; or the executors of the party originally liable, *Jefferson v. Warrington*, 7 M. & W. 137; or his assignees in bankruptcy, *Clarkson v. Parker*, 7 Dowl. 87. A married woman must apply by her next friend, in *re Waugh*, 15 Beav. 508. See notes to Judic. Act, O. XII., r. 9.

Where several parties are jointly chargeable, they should concur in the application, *re Lewin*, 16 Beav. 608; *re Perkins*, 8 Beav. 241; *re Mobbs*, 8 Beav. 499; and an order obtained by one of them, on an allegation that he alone employed the solicitor, will be discharged as irregular, *re Beecher, Barker and Street*, 2 Ch. Ch. R. 215; *Hobby v. Pritchard*, 2 M. & W. 124. If one of the parties liable refuses to concur, the order may be obtained by the other, *Hazard v. Lane*, 3 Mer. 285; *Lockhart v. Hardy*, 4 Beav. 224; the one refusing to concur should be served with the petition, *re Hair*, 10 Beav. 187; 11 Jur. 139; but the order cannot be made after action has been brought against the two, *re Chilcote*, 1 Beav. 421.

As to security for costs being required from the party applying, see *re Dolman*, 11 Jur. 1095; *re Pasmore*, 1 Beav. 94; *re Foley*, 11 Beav. 466; *Murrow v. Wilson*, 12 Beav. 497.

The fact that an action is pending for the amount of a bill, does not give the Common Law Judge jurisdiction to tax the bill, *Bush v. Sayer*, 7 M. & G. 1027; *Cowdell v. Neale*, 1 O. B. N. S. 332.

An order of course, though right on the merits, will be discharged if obtained in a case where a special application was necessary, *Harris v. Start*, 4 M. & C. 261; *Grove v. Sansom*, 1 Beav. 297; *Gegg v. Tayler*, 1 Beav. 123; as to the costs of a special application, where an *ex parte* application would have been sufficient; see *re Cattlin*, 8 Beav. 121; *re Bracey*, 8 Beav. 338; *re Bignold*, 9 Beav. 269; *re Adamson*, 18 Beav. 460; *re Atkinson*, 26 Beav. 151; *re Lett*, 31 Beav. 488.

A special application is necessary where the application is to tax part only of the bill claimed, *re Byrch*, 8 Beav. 124; *re Dalby*, 8 Beav. 469; *re Wavell*, 22 Beav. 634; *re Yetts*, 33 Beav. 412; *Stokes v. Trumper*, 2 K. & J. 232; but see *re Hinton*,



15 Beav. 192; *re* Fluker, 20 Beav. 143; or where it is made by some only of several parties jointly liable, *re* Ilderton, 33 Beav. 201; or where there is a special agreement as to retainer, *re* Thurgood, 19 Beav. 541; or a special agreement as to the costs, *re* Winterbotham, 15 Beav. 80; or to give the solicitor a lien, *re* Moss, 17 Beav. 69; and see *re* Ransom, 18 Beav. 220; *re* Fisher, 18 Beav. 183.

A special agreement respecting part of the costs, unless it goes to the whole bill, is not a bar to an order for taxation, though formerly held to be so, *re* Eyre, 10 Beav. 569; 2 Phil. 367; *re* Forsyth, 34 Beav. 140; *re* Thompson, 14 L. T. N. S. 6; but if the fact of the agreement is suppressed, the order will be discharged, *re* Carven, 8 Beav. 436; *re* Holland, 19 Beav. 314; *re* Ingle, 21 Beav. 275. An agreement to charge a fixed sum in lieu of costs hereafter to be incurred is void, *Philby v. Hazle*, 7 Jur. N. S. 125; *Pince v. Beattie*, 11 W. R. 979; *re* Newman, 30 Beav. 196; but as to an agreement to pay a solicitor a fixed salary, see *Galloway v. Corporation of London*, 4 L. R. Eq. 90; and see *Jarvis v. Great Western Railway Co.*, 8 C. P. 280.

The solicitor may waive an irregularity in obtaining the order, *re* Hair, 11 Beav. 96; *re* Bevan, 12 W. R. 196; *re* Bartrum, 12 W. R. 660; *re* Field, 16 Beav. 593; *re* Wavell, 22 Beav. 634.

A bill must be delivered before it will be referred for taxation, therefore at Common Law the first application was for delivery, *re* Eccles, 6 U. C. L. J. 69; for a Judge could not by the same order direct the delivery and a reference to taxation, *re* Boomer, 16 C. P. 163. In Chancery it has always been the practice, when necessary, to embrace in the same order, the order for delivery and taxation.

A bill for conveyancing only cannot be referred, but it may where it consists wholly or in part of business done in Court, *re* Lemon & Peterson, 8 U. C. L. J. 185; but see *re* O'Donohoe & Warmoll, 4 Pr. R. 266, where attorneys were ordered to deliver a bill of costs for business done by them as such, though the services performed were not for business done in Court; and see *re* Eccles, 6 U. C. L. J. 69.

The practice as to the manner in which the Master will tax solicitor's costs for professional services rendered in the sale of lands and collection and transmission of purchase money, was defined in *re* Richardson, 3 Ch. Ch. R. 144.

The mortgagees of land having brought ejectment and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor, accompanied by a statement of the amount due, in which one item was for "solicitor's costs, \$143." The particulars being asked for, two separate bills were rendered, one of the ejectment, the other of the sale:—Held, that the two bills might be considered as particulars of the one item in the previous statement, and that the bill of costs in the suit drew with it the other bill, which would not alone have been subject to taxation, and both bills were therefore referred, *ex parte* Glass, in *re* Macdonald, 3 Pr. R. 138. See now as to taxation of the costs of a mortgagee exercising a power of sale, 42 Vic. c. 20, s. 11 O.; *Ferguson v. English and Scottish Investment Company*, 8 Pr. R. 404. Where a solicitor has funds of a client in his possession, or has papers over which he claims a lien, this Court will order delivery and taxation of his bills and payment of any balance, though the services for which he claims have been wholly in County Court proceedings, *re* Prince, 3 Ch. Ch. R. 282; but where a client applied for taxation of the costs in two suits, one in Chancery and the other in a County Court, denying the retainer in the Chancery suit, but admitting it in the other, and the solicitor made no claim for costs in the suit in Chancery, it was held that the Court of Chancery could not order a taxation between the client and solicitor, in *re* Malcolm C. Cameron, 1 Ch. Ch. R. 356.

The bill is one entire matter, and in taxation the client cannot separate certain charges for taxation, and ask that they alone be referred, in *re* Davy, 1 U. C. L. J. N. S. 213.

In referring to taxation, there is no authority here, without consent, to reserve the right to dispute the retainer; the right to do so in England exists under 6 & 7 Vic., c. 73, which differs from section 49 of the statute here, in *re* Totten, 27 Q. B. 449; but where, on an application by a solicitor for a taxation, the client disputed the retainer as to the whole bill, and also set up the Statute of Frauds, it was held that the Court could refer these defences to the Master, *re* Bacon, 3 Ch. Ch. R. 79; and see *re* Lewis, 9 U. C. L. J. 81; *re* Toms, 3 Ch. Ch. R. 204. Where a solicitor has no written retainer, and it is disputed and the evidence is conflicting, weight is given to the denial of the client as against the solicitor, in *re* Eccles v. Carroll, 1 Ch. Ch. R. 263.

**34.** In case no application is made within the month, then the Court or Judge upon the application of either party may order a reference with such directions and conditions as he may deem proper; and may upon such terms as may be thought just restrain any suit for such demand pending the reference. C. S. U. C., c. 35, s. 29.

As to the word "month," see notes to sec. 32. Where the bill has been delivered more than a month, the client must apply for taxation in Chambers; otherwise the order can be obtained on *præcipe*, *re Boulthée*, 2 Ch. Ch. R. 58; bill with exorbitant charges ordered for taxation, although paid, and several months had elapsed since its delivery, *Doe & Fraser v. Eaglesum*, 5 O. S. 77; and see notes to sec. 47.

As to the particulars which every order for taxation is to be read as containing, see *Judicature Act*, O. L., r. 16; and notes to sec. 37.

**35.** No such reference shall be directed upon application made by the party chargeable with such bill after a verdict has been obtained or a writ of inquiry executed, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made. C. S. U. C., c. 35, s. 30.

The lapse of less than twelve months may be an objection to granting the application, *re Bayley*, 18 Beav. 415; *re Pugh*, 32 Beav. 173; 11 W. R. 762; *re Browne*, 1 D. M. & G. 322.

A dispute and correspondence as to alleged omissions in the bill, held sufficient apology for the lateness of the application, *re Bagshawe*, 2 D. & Sm. 205; and where the relation of solicitor and client continued until within a year before the application was made, and the last account had been delivered within the year, it was held a material circumstance in accounting for the delay, *re Nicholson*, 3 D. F. & J. 93, 100; but the solicitor's possession of the papers in the suit was not, *re Gedye*, 15 Beav. 254.

For cases where lapse of time and laches have been a bar to taxation, see *re Vines*, 2 D. M. & G. 842; *Blagrove v. Routh*, 8 D. M. & G. 620.

To entitle a client to taxation after twelve months, he must shew either "pressure accompanied by some overcharge," or "gross overcharge amounting to fraud," *re Strother*, 3 K. & J. 518; *re McCay*, 15 L. T. N. S. 101; *re Cameron*, 2 Ch. Ch. R. 311.

As to what circumstances constitute such pressure or fraudulent overcharge, see notes to sec. 47.

The Court, on ordering taxation after the twelve months, will, if necessary, restrict the taxation within certain limits, *re Nicholson*, 3 D. F. & J. 93.

As to the parties chargeable, see notes to sec. 43.

**36.** In case either party to any such reference, having due notice, refuses or neglects to attend the taxation, the officer to whom the reference is made, may tax the bill *ex parte*; and in case the reference is made upon the application of either party, and the party chargeable with the bill attends the taxation, the costs of the reference shall be paid according to the event of the taxation, except that if a sixth part be taxed off, the costs shall be paid by the party by whom or on whose be-

half such bill was delivered; and if less than a sixth part be taxed off, then by the party chargeable with such bill, if he applied for or attended the taxation. C. S. U. C. c. 35, s. 31.

The Court has no discretion to allow the costs of taxation, when the party chargeable neither obtains the order, nor attends under an order obtained by the solicitor, *re Kerr*, 2 Ch. Ch. R. 47.

Only those payments are allowed on taxation which are made by the solicitor in his professional capacity, *re Remnant*, 11 Beav. 603; cash payments made by the solicitor in proceedings where he was not professionally concerned, are not allowed to be included, *Hemming v. Wilton*, 4 Car. & P. 318; *re Lees*, 5 Beav. 410; *Prothero v. Thomas*, 6 Taunt. 195.

Where a solicitor has been retained for a particular business, his bill of costs for carrying it through constitutes one bill, *Stokes v. Trumper*, 2 K. & J. 232; *re Peach*, 2 Dow. & L. 33.

After the bill has been referred for taxation no alteration can be made in it, *re Wells*, 8 Beav. 416; *re Catlin*, 18 Beav. 598; *Davis v. Earl of Dysart*, 21 Beav. 124; 8 D. M. & G. 33; in *re Davy*, 1 L. J. N. S. 213; except by consent, or on special application for leave to amend, *re Andrews*, 17 Beav. 510, 514. This leave has been given to amend, by inserting omitted items, and increasing under charges, *re Crawford & Crombie*, 2 Ch. Ch. R. 13; but not to decrease over charges, *re Whalley*, 20 Beav. 576; nor to withdraw items improperly inserted, *re Carven*, 8 Beav. 436; *re Jones*, 8 Beav. 479; *re Blakesly*, 32 Beav. 379; and see *re B. & S.* 6 Pr. R. 18. A solicitor having delivered his bill, is bound by it so far, that he cannot substitute another bill for it, even before notice of an order to tax is served on him, without paying all the costs incurred by the client up to the date of obtaining such order, *re Chambers*, 34 Beav. 177. Solicitors delivered bills of costs indorsing on each, "In the event of taxation, we reserve to ourselves the right of delivering another and more complete bill."—Held, an absolute delivery, in *re Spencer & McDonald*, 19 Gr. 467.

The rule as to one sixth is imperative in an ordinary reference to taxation, *re Woollett*, 12 M. & W. 504; but where the reference is special, the costs are in the discretion of the Judge, *Toghill v. Grant*, 6 Beav. 348; *Higgins v. Woolcot*, 5 B. & C. 760; and see *May v. Bigginden*, 24 Beav. 207; *re Hair*, 11 Beav. 96. Where more than a sixth is taken off, the assignees of an insolvent, or bankrupt solicitor are personally liable for the costs of taxation, *re Peers*, 21 Beav. 520; *re Peile*, 25 Beav. 561; and under similar circumstances, the insolvent was, notwithstanding his discharge, held personally liable, *Whalley v. Williamson*, 6 Man. & Gr. 269. Where a bill was ordered to be taxed (questions as to liability being reserved,) and less than a sixth was struck off, it was held that, whatever might be the result of the questions reserved, the client must pay the cost of taxation, *re Shaw*, 20 L. J. Q. B. 280. Where the Master disallows some items and adds others, the bill is to be considered as increased by the items allowed, and then reduced by those disallowed, *re Hartley*, 2 Jur. N. S. 448; and see *re Clark*, 13 Beav. 173; 1 D. M. & G. 43.

Items included, which are chargeable against another person, must be reckoned in as against the solicitor, *re Colquhoun* 1 Sm. & G. app. 1; 5 D. M. & G. 35. The Master is not to take into consideration, in determining whether one-sixth has been taxed off the bill, items which are not properly taxable items, such as Sheriff's fees and witness fees, etc., not actually to be repaid to the attorney nor a part of his claim, in *re Davy*, 2 U. C. L. J. N. S. 70; where one item had been abandoned by an attorney after a summons taken out for taxation, but before actual taxation, and one-sixth was afterwards struck off the whole bill, including such item, the attorney was ordered to pay the costs of taxation, *re Davy*, 5 Pr. R. 55.

Where a solicitor offered to make a reduction in his bill, the Court held the Master should not charge him with the costs of taxation, unless the bill has been reduced one-sixth independently of the voluntary deduction, *re Freeman, Craigie & Proudfoot*, 1 Ch. Ch. R. 102.

For the manner in which costs for professional services rendered in the sale of lands and collection and transmission of the purchase money, see *re Richardson*, 3 Ch. Ch. R. 144. If charges are unusual or exceptional, the solicitor has to make out a very clear case to have them allowed, *re A. B.*, 8 U. C. L. J. N. S. 21. If the usual charges are made, but the client complains of negligence or unskilfulness not apparent on the face of the bill, then the onus rests on him to establish his case, *Ibid.*

**37.** Every order for such reference shall direct the officer to whom the reference is made to tax the costs of the reference, and to certify what, upon the reference, he finds to be due to or from either party in respect of such bill and of the costs of reference, if payable. C. S. U. C. c. 35, s. 32.

The Judicature Act, O. L. r. 16, provides as follows:—

R. 16. Where a solicitor's bill of fees, charges and disbursements as delivered to a client or other person is referred to the Master to be taxed, the solicitor is to give credit for all sums of money by him received from or on account of the said client, and is to refund what, if anything, he may on such taxation appear to have been overpaid.

(a) The Master is to tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand and of the cost of the reference, to be paid according to the event of the taxation pursuant to the statute.

(b) The solicitor is not to commence or prosecute any action or suit touching the demand pending the reference without leave of the Court or a Judge.

(c) Upon payment by the said client or other person of what (if anything) may appear to be due to the solicitor, the solicitor (if required) is to deliver to the said client or other person, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power, belonging to the said client.

(d) Order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions which the Court or Judge shall see fit to make.

**38.** Such officer may certify specially any circumstances relating to such bill or taxation, and the Court or Judge may thereupon make such order as may be deemed right respecting the payment of the costs of the taxation. C. S. U. C. c. 35, s. 33.

**39.** In case such reference is made when the same is not authorized, except under special circumstances as hereinbefore provided, the Court or Judge, in making the same, may give any special directions relative to the costs of the reference. C. S. U. C. c. 35, s. 34.

**40.** Where no bill has been delivered, sent or left as aforesaid, and where such bill if delivered, sent or left, might have been referred as aforesaid, any such Court or Judge may order the delivery of a bill, and may also order the delivery up of deeds or papers in the possession, custody or power of the attorney or solicitor, his assignee or representatives, in the same manner as has heretofore been done in cases where any such business had been transacted in the Court in which such order was made. C. S. U. C. c. 35, s. 35.

An attorney may be ordered to deliver his bill though it has been fully settled, and to give credit therewith for all moneys received, in *re Francis v. Boulton*, 6 U. C. L. J. 20; *Quare*, can attorneys properly be made to pay the costs of an order for delivery of bills of costs, in *re Lemon & Peterson*, 1 L. J. N. S. 19. At Common

Law a Judge could not by the same order direct the delivery of a bill, and a reference of it to taxation when delivered, *re Boomer*, 16 C. P. 163; but in Chancery such an order has always been made when necessary.

Orders under this section may be enforced by attachment, *re Bowen*, 11 W. R. 607; no action at law lies for disobedience to the order, *Dent v. Basham*, 9 Ex. 469. Where the order was not obeyed, and the solicitor swore that he had no papers from which he could make out his bill, the Court refused to commit him for non-delivery, *re Ker*, 12 Beav. 390.

The Court will before the completion of the taxation, order the delivery of papers to the client, either upon payment into Court of the amount claimed, or where it appears from the solicitor's own account that a balance is due from him to the client, *re Bevan*, 33 Beav. 439; as to inserting a direction for delivery of papers in the common order for taxation, see *re Pender*, 8 Beav. 299; *re Teague*, 11 Beav. 318.

Where a solicitor voluntarily withdraws he must deliver the client's papers to the new solicitor, but where he is discharged by the client, he is not disentitled to his lien, even though the reason is that he is in embarrassed circumstances, *re Smith*, 9 W. R. 396; *re Williams*, 28 Beav. 465; 3 D. F. & J. 104.

The client is entitled to the convenient use of his papers in pending business, even where the lien exists, *Rawlinson v. Moss*, 9 W. R. 733; and where a solicitor refused to carry on a suit unless money was advanced, or to deliver up the papers until his costs were paid, the Court on the client's application, ordered a taxation, and that the papers should be delivered to the new solicitor on his undertaking to hold them subject to the former solicitor's lien, if any, and to re-deliver them within ten days after he had ceased to have occasion for them for the purposes of the suit, *Ley v. Brown*, 1 Ch. Ch. R. 179; but see *Moodie v. Thomas*, 1 Ch. Ch. R. 19; and as to the right of an attorney to detain books of account belonging to his client, on an alleged claim, *McLean v. Maitland*, 5 U. C. L. J. 279.

**41.** In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left in manner aforesaid; but the other party may shew that the bill so delivered, sent or left, was not such a bill as constituted a *bona fide* compliance with this Act. C. S. U. C. c. 35, s. 36.

**42.** Any Judge of the Superior Courts of Law or Equity or a County Judge, on proof to his satisfaction that there is probable cause for believing that the party chargeable is about to quit Ontario, may authorize an attorney or solicitor to commence an action for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month has not expired since the delivery of a bill as aforesaid. C. S. U. C. c. 35, s. 37.

**43.** When any person not being chargeable as the principal party is liable to pay or has paid any bill either to the attorney or solicitor, his assignee, or representative, or to the principal party entitled thereto, the party so paying, his assignee or representative, may make the like application for a

reference thereof to taxation and in like manner as the party chargeable therewith might himself have made, and the same proceedings shall be had thereupon, as if such application had been made by the party so chargeable. C. S. U. C. c. 35, s. 38.

A mere volunteer, under no previous liability, undertaking to pay a solicitor's bill, does not acquire a right to tax it, *re* Becke, 5 Beav. 406; but where a suit was compromised, plaintiff agreeing to pay defendant's costs, plaintiff was held entitled to an order for taxation of the bill, *re* Hartley, 30 Beav. 620.

The bill of a mortgagee's solicitor for business done in regard to the mortgaged estate, may be taxed by the mortgagor, *re* Lees, 5 Beav. 410; *re* Carew, 8 Beav. 150; *re* Wells, 8 Beav. 416; or by a subsequent incumbrancer, *re* Taylor, 18 Beav. 165; *re* Jessop, 32 Beav. 406.

The mortgagees of land having brought ejectment, and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor, accompanied by a statement of the amount due, in which one item was for "solicitor's costs, \$143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale:—Held, that the mortgagor was clearly a person entitled to apply for taxation within this section of the Act, *ex parte* Glass, in *re* Macdonald, 3 Pr. R. 138. An assignee in insolvency employed a firm of attorneys to perform certain services in connection with the estate, subsequently he resigned the position and gave these attorneys the moneys of the estate remaining in his hands, with instructions to pay their own costs first, and then to hand the balance to the new assignee. This they did and rendered their bill of costs:—Held, that the estate of the insolvent was within the meaning of this section, the "party liable to pay," though "not chargeable as a principal," and the second assignee was entitled to have the bill taxed, in *re* A. & B., 6 Pr. R. 68. But after payment by the mortgagee of the solicitor's costs the mortgagor cannot obtain an order for taxation; his only remedy is by a bill for an account, *re* McDonald, McDonald & Marsh, 8 Pr. R. 88; and see 42 Vic. c. 20, s. 11, O; *Ferguson v. English and Scottish Investment Co.*, 8 Pr. R. 404.

Where, on a settlement of several suits between the parties, it was agreed that defendant should pay, among other things, all the costs of every kind, including retainers, for which the plaintiff was liable to his attorney, it was held that defendant, though he had not paid the bills, was entitled to have them referred to taxation on the usual terms, in *re* Greenwood, 10 U. C. L. J. 131.

The taxation at the instance of the third party must be as between the solicitor and his client, not as between the solicitor and the third party, *re* Wells, 8 Beav. 416; *re* Jones, 8 Beav. 479; *re* Fyson, 9 Beav. 117; *re* Barrow, 17 Beav. 547; and if the client is not entitled to tax the bill, as if it has been paid without pressure, &c., the third party cannot tax it; but if an excessive amount has been paid he must file a bill against the client who paid the bill to reduce his liability, *re* Massey, 34 Beav. 463; and see *re* Forsyth, 34 Beav. 140; on appeal, 13 W. R. 932.

44. In case such application is made when, under the provisions hereinbefore contained a reference is not authorized to be made except under special circumstances, the Court or Judge to whom the application is made, may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill, if he was the party making the application. C. S. U. C. c. 35, s. 39.

As to the meaning and effect of this section, see *re* Vardy, 20 L. J. Ch. 325.

45. For the purpose of any such reference upon the application of the person not being the party chargeable, or of a party interested as aforesaid, such Court or Judge may order



the attorney or solicitor, his assignee or representative, to deliver to the party making the application a copy of the bill, upon payment of the costs of the copy. C. S. U. C. c. 35, s. 40.

46. No bill previously taxed shall be again referred, unless under the special circumstances of the case the Court or Judge to whom the application is made thinks fit to direct a retaxation thereof. C. S. U. C. c. 35, s. 41.

A retaxation will not be ordered unless improper charges are specified and established, *Eastman v. Eastman*, 2 Ch. Ch. R. 325; and see *Cameron v. Campbell*, 1 Pr. R. 170.

47. The payment of any such bill as aforesaid, shall in no case preclude the Court or Judge to whom application may be made from referring such bill for taxation, if the application be made within twelve months after payment, and if the special circumstances of the case in the opinion of such Court or Judge appear to require the same, upon such terms and subject to such directions as to the Court or Judge seem right. C. S. U. C. c. 55, s. 42.

The giving of security is for the purpose of this section equivalent to payment, *ex parte Turner*, 5 D. M. & G. 540; *Sayer v. Wagstaff*, 5 Beav. 415; *re Currie*, 9 Beav. 602; *re Harper*, 10 Beav. 284; *re Fairbanks*, 1 Ch. Ch. R. 222; but retainer by the Solicitor is not, *re Steele*, 20 L. J. Ch. 562; *re Bignold*, 9 Beav. 269; but see *ex parte Shackell*, 2 D. M. & G. 842; *ex parte Heming*, 28 L. T. 144.

"Special circumstances" have generally been held to signify either "pressure, accompanied by some overcharge," or "overcharges or errors so gross as to amount to fraud." For cases of pressure, such as the refusal to deliver up deeds, see *re Alcock*, 2 Coll. 92; *re Elmalie*, 12 Beav. 538; *re Lett*, 31 Beav. 488; *re Pugh*, 32 Beav. 173; 1 D. J. & S. 673; or threats to enforce securities, *re Kinneir*, 7 W. R. 175; *re Rance*, 22 Beav. 177; *re Foster*, 2 D. F. & J. 105; or generally taking advantage of the exigencies of the client's position, *re Stephen*, 2 Ph. 562; *Nokes v. Wharton*, 5 Beav. 448. These cases do not apply if the client has had an opportunity of examining and taxing the bill, *re Neate*, 10 Beav. 181; *re Welchman*, 11 Beav. 319; *re Currie*, 9 Beav. 602; *re Boyle*, 5 D. M. & G. 540; *re Browne*, 1 D. M. & G. 322. In *re Barrow*, 17 Beav. 547, the M. R. said the doctrine of pressure in cases of taxation after payment is not to be extended.

Where there has been no pressure the Court will, after payment, order taxation only on proof of "overcharges amounting to evidence of fraud," *re Strother*, 3 K. & J. 518; *Ruttan v. Austin*, 8 U. C. L. J. 47; *Gillespie v. Shaw*, 10 U. C. L. J. 100. Some of the particular items relied on must be specifically pointed out, *Dunt v. Dunt*, 9 Beav. 146; *re Towle*, 30 Beav. 170; *re Browne*, 1 D. M. & G. 322, 333; trifling items will be insufficient, *re Drake*, 8 Beav. 123; *re Thompson*, 8 Beav. 237; *re Bayley*, 18 Beav. 415; if the practice in the taxing-master's office as to allowing the items objected to is uncertain, the solicitor has the benefit of the doubt, *re Walsh*, 12 Beav. 490; and generally the onus rests on the client to shew that the charges under the special circumstances were fraudulent, *re Towle*, 30 Beav. 170.

Where the overcharges evidence actual fraud, very slight circumstances will induce the Court to re-open the taxation, *Nokes v. Wharton*, 5 Beav. 448; *re Harding*, 10 Beav. 250.

See also as to great overcharges, *Sayer v. Wagstaff*, 5 Beav. 415; *re Bennett*, 8 Beav. 467; *re Sladden*, 10 Beav. 488; *ex parte Andrews*, 13 L. J. Ch. 222; *ex parte Hemming*, 28 L. T. 144.



The Court will only direct taxation if there is at least a reasonable belief that if the bill be taxed, some of the charges will be disallowed, *re Sladden*, 10 Beav. 488; therefore some items of overcharge should be pointed out, *re Brady*, 15 W. R. 632; *re Cameron*, 2 Ch. Ch. R. 311; though not necessarily such as amount to fraud, *re Newman*, 15 W. R. 630; *re Wells*, 8 Beav. 416; *re Hubbard*, 15 Beav. 251; *re Abbott*, 18 Beav. 393; *re Towle*, 30 Beav. 170.

The absence of any affidavit or other evidence as to items of overcharge, will be a reason for dismissing the petition, *ex parte Barton*; *re Finch*, 16 Beav. 585; 4 D. M. & G. 108; *re Thompson*, 2 Ch. Ch. R. 100.

That the bill was paid under protest is material only if connected with circumstances of overcharge or pressure, and where a bill is paid under protest, the items objected to should, if possible, be pointed out, *re Dearden*, 9 Exch. 210, *re Bayley*, 18 Beav. 415; *re Davie*, 8 W. R. 15.

48. In all cases in which a bill is referred to be taxed, the officer to whom the reference is made may request the proper officer of any other Court, to assist him in taxing any part of such bill, and such officer, so requested, shall thereupon tax the same, and shall have the same powers, and may receive the same fees in respect thereof, as upon a reference to him by the Court of which he is such officer, and he shall return the bill, with his opinion thereon, to the officer who so requests him to tax the same. C. S. U. C., c. 35, s. 43.

49. All applications made to refer any bill to be taxed, or for the delivery of a bill, or for the delivering up of deeds, documents, and papers, shall be made "In the matter of (such attorney or solicitor);" and upon the taxation of any such bill, the certificate of the officer by whom the bill is taxed shall (unless set aside or altered by order of a Judge, decree or rule of Court,) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the practice of the Court in which the reference has been made. C. S. U. C., c. 35, s. 44.

This section differs from the English Act, 6 & 7 Vic., c. 73, and it has been held that under this section there is no authority, without consent, to reserve the right to dispute the retainer, in *re Totten*, 27 U. C. R. 449. But where, on an application by a solicitor for a taxation, the client disputed the retainer as to the whole bill, and also set up the Statute of Frauds, it was held that the Court could refer these defences to the Master, *re Bacon*, 3 Ch. Ch. R. 79; and see *re Lewis*, 9 U. C. L. J. 81.

ive, to de-  
of the bill,  
c. 35, s. 40.

red, unless  
t or Judge  
a retaxa-

pecified and es-  
v. Campbell,

d, shall in  
taxation may  
he applica-  
and if the  
such Court  
s and sub-  
seem right.

t to payment,  
15; *re Currie*,  
R. 222; but  
gnold, 9 Beav.  
28 L. T. 144.

ner "pressure,  
as to amount  
p deeds, see *re*  
; *re Pugh*, 32  
neir, 7 W. R.  
nerally taking  
562; *Nokes v.*  
had an oppor-  
Welchman, 11  
Browne, 1 D.  
ne of pressure

order taxation  
trotter, 3 K.  
0 U. C. L. J.  
pointed out,  
D. M. & G.  
Thompson, 8  
ster's office as  
benefit of the  
client to shew  
*re Towle*, 30

stances will  
148; *re Hard-*

*re Bennett*, 8  
222; *ex parte*

An Act for better securing Trust Funds, and for  
the relief of Trustees.

(Imperial Statutes, 10 & 11 Vict., Cap. 96.)

[22nd July, 1847.]

WHEREAS it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved: Be it enacted, etc., that all trustees, executors, administrators, or other persons having in their hands any moneys belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit, shortly describing the instrument creating the trust, according to the best of their knowledge and belief to pay the same, with the privity of the Accountant-General of the High Court of Chancery into the Bank of England, to the account of such Accountant-General in the matter of the particular trust, (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court, and that all trustees or other persons having any annuities or stocks standing in their names in the books of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, or any Government or Parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court; and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or, in the case of stocks or securities the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited.

2. And be it enacted that such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust moneys, stocks, or securities so paid in, transferred and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit to direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted.

[3. Regulates salary of Accountant-General.]

[4. Gives power to the Lord Chancellor to make orders for better carrying the provisions of this Act into effect.]

[5. Construes the expression "Lord Chancellor."]

The Court of Chancery of Ontario had the like jurisdiction and power as the Court of Chancery in England possessed on the 10th June, 1857, as a Court of Equity to administer justice in all cases in which there existed no adequate remedy at law. R. S. O. c. 40, s. 36. By virtue of this provision, the Court had both the equity and statutory jurisdiction which the Court of Chancery in England at that date possessed, and it is by virtue of that provision that the Court exercised the jurisdiction conferred on the Court of Chancery in England by the Trustee Relief Acts, passed prior to the 10th June 1857. The Trustee Acts are in force here as well as in England, per Esten, V. C., *Hill v. Ironsides*, 3rd September, 1861, and see *re Lash*, 1 Ch. Ch. R. 226.

By the Ontario Judicature Act, 1881, it is provided (sec. 9) that the High Court of Justice shall have the jurisdiction which at the commencement of this Act, was vested in, or capable of being exercised by the Court of Chancery, and shall be deemed to be, and shall be a continuation of the Courts named in that section. Although the High Court of Justice in Ontario exercises this jurisdiction, it is not correct to say that those Imperial Statutes are in force in Ontario. As statutes of the Imperial Legislature they have no force in Ontario; their effect here is due to their being incorporated into the statutes of our Provincial Legislature, and by virtue of such incorporation becoming in effect Acts of the Provincial Legislature, see observations of Esten V. C. *re Hodges*, 1 Gr. 289.

The jurisdiction which the Court here exercises by virtue of these Acts would still be exercised, although they should be repealed by the Imperial Parliament.

*Persons entitled to pay money in.*—The following persons have been held entitled to pay money into Court under this Act:—(1) *Mortgagees* who have sold under a power of sale, where there is a doubt as to the person entitled to the surplus, *Roberts v. Ball*, 24 L. J. Ch. 471; *re Kingsland*, 15 C. L. J. 85; but see *Western Canada L. & S. Co. v. Court*, 25 Gr. 151. (2) *Insurance Companies* where there are adverse claims to the moneys payable under the policy, and the policy is subject to a trust, *Desborough v. Harris*, 5 D. M. & G. 439; *re Hall*, 10 W. R. 37; *re United Kingdom Assurance Co.*, 34 Beav. 493; *re Webb*, L. R. 2 Eq. 456; *re Moseley*, 18 W. R. 126. But the Act does not authorize money payable under a policy to be paid into Court merely because it is doubtful who is entitled to receive it, *Matthew v. Northern Assurance Company*, L. R. 9 Ch. D. 80. But where money has been paid into Court in a case to which the Act does not apply, on an application for payment out that objection cannot be entertained, the only mode in which it can be raised is by bringing a suit, *re Haycock*, L. R. 1 Ch. D. 611. (3) *Purchasers* who cannot otherwise get receipts, *Cox v. Cox*, 1 K. & J. 251. (4) *Stakeholders*, *re Kemptner*, L. R. 8 Eq. 286; *re United Kingdom Life Assurance Company*, 34 Beav. 494; but see *Western Canada L. & S. Co. v. Court*, *supra*; *Matthew v. Northern Assurance Co.*, *supra*. (5) *Executors, administrators or trustees*, even where they claim a beneficial interest in the fund, *re Henshaw*, 43 L. J. Ch. 98; or where they cannot get a valid discharge otherwise, *e.g.*, where the *c. q. t.* is an infant, *re Cawthorne*, 12 Beav. 56; *re Beauclerk*, 11 W. R. 203; *re Coulson*, 4 Jur. N. S. 6; *re Richards*, L. R. 8 Eq. 119; or a lunatic, *re Upfull*, 3 McN. & G. 281; *re Irby*, 17 Beav. 334; but in other cases there must be a *bona fide* doubt as to the party entitled, *re Jones*, 3 Drew, 679; *re Headington*, 6 W. R. 7; *re Lane*, 24 L. T. 181; or as to some question of law arising on the claim, *re McLean*, L. R. 19 Eq., 282.

*Act not compulsory.*—A trustee who prefers to act personally in the trust cannot be compelled to pay the trust fund into Court, *Mountain v. Young*, 18 Jur. 769; *Handley v. Davis*, 28 L. J. Ch. 873. But where stock was standing in the name of a deceased trustee, and his next of kin refused to administer to his estate so as to be mixed up with the trust, an order was made for the transfer of the stock into Court, on the petition of the tenant for life, and the petitioner's solicitor was appointed to make the transfer, *re Thornton*, 9 W. R. 475.

And where in consequence of the refusal of a trustee to pay the trust fund into Court a suit became necessary, he was ordered to pay the costs of it, *Handley v. Davis*, 28 L. J. Ch. 873; and see *Gunnell v. Whitear*, L. R. 10 Eq. 664.

Under Imperial Statute, 12 & 13 Vict., c. 74, an order may be made for payment in, where the majority of the trustees are willing though the rest do not concur.

*Persons not entitled to pay money in.*—A person whose estate is charged with a sum of money in favour of another, as, for instance, a mortgagor, is not entitled to pay the amount of such charge into Court, *re Buckley*, 17 Beav. 110; *re Cooper*, 17 Jur. 1087; *Warburton v. Cicognara*, I. R. 3 Eq. 592; but see *Trustee Act*, 1850, s. 48.

A mere debtor cannot, because he has doubts as to his creditors' title to receive the money, avail himself of the provisions of the Act by paying the amount of the debt into Court, *Matthew v. Northern Assurance Company*, L. R. 9 Ch. D. 80.

*Foreign Bonds.*—The Act does not authorize the transfer of the bonds of a foreign government into Court, *re Lloyd*, 2 W. R. 371.

*Payment in—How made.*—Under the English practice no order is necessary for payment of money into Court under the Trustee Relief Acts, *re Biggs*, 11 Beav. 27.

The following general orders were made in England, in pursuance of the power given by the Act:

1. Any trustee desiring to pay money or transfer stock or securities into the name of the Accountant-General of the Court of Chancery under the said Act, is to file an affidavit entitled in the matter of the Act and of the trust, and setting forth: (1) His own name and address; (2) The place where he is to be served with any petition, or any notice of any proceeding or order of the Court relating to the trust fund; (3) The amount of stock, securities or money which he proposes to deposit, or to transfer, or to pay into Court to the credit of the trust; (4) A short description of the trust, and of the instrument creating it; (5) The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief

of the trustee; (6) The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities, or money transferred, deposited, or paid in, under the Act, as the Court may think proper to direct.

2. The Accountant General, on production of an office copy of the affidavit, is to give the necessary directions for transfer, deposit, or payment, and to place the stock, securities or money to the account of the particular trust, and such transfer, deposit or payment is to be certified in the usual manner.

3. The trustee, having made the payment, transfer or deposit, is forthwith to give notice thereof to the several persons named in his affidavit as interested in or entitled to the fund.

4. Such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

5. The trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any party interested therein or entitled thereto.

3. The parties interested in or entitled to the fund, are to be served with notice of any application made to the Court by the trustees respecting the fund in Court, or the interest or dividends thereof.

7. No petition is to be set down to be heard, until the petitioner has first named a place where he may be served with any petition or notice of any proceeding or order of the Court relating to the trust fund.

8. Petitions presented and affidavits filed under the said Act are to be entitled in the matter of the said Act (10 & 11 Vic. c. 96), and in the matter of the particular trust.

These orders shew the mode of proceeding under the Act at the date, when by virtue of the Statutes already referred to, the Court of Chancery in Ontario acquired power to exercise this jurisdiction. It may be doubted whether they are, properly speaking, in force here, and the practice has been to apply in Chambers or to the Court for an order authorizing the payment of the money into Court. (See Leggo's Forms (2nd ed.) No. 797-9.)

The affidavit on which the application is founded should give full information as to the trust, so as to shew on the account how the sum paid in is affected thereby, *re Waring*, 16 Jur. 652. The affidavit should also state all persons who are claimants of the fund of whom the deponent has knowledge, otherwise the trustee may be charged with the costs of any such claimant obtaining a stop order, *re Allen*, 40 L. T. N. S. 456. All the trustees should join in the affidavit, but under particular circumstances the affidavit of one of several trustees may be accepted, \_\_\_\_\_ v. \_\_\_\_\_, 1 Jur. N. S. 974.

The order should provide that a copy of it shall be served on the parties named in the trustees' affidavit, as being interested in the trust fund. (See Leggo's Forms (2nd ed.), No. 799.)

The Court refused, on an *ex parte* application, to give any special directions for service of notice of the payment of the fund into Court, but:—Held that the sufficiency of the notice served must be determined on the motion for payment out, *re Hardley*, L. R. 10 Ch. D. 664.

*Effect of payment in of Trust Fund.*—The trustee, by payment into Court, discharges himself from the future administration of, and control over the trust fund paid in, *re Coe*, 4 K. & J. 199; *re Wright*, 3 K. & J. 421, and the Court undertakes such administration in his place, so that where a trustee had paid money into Court, and a new trustee was thereupon appointed as in the case of a trustee desiring to be discharged, it was held that the trustee, by paying the fund into Court, had in effect retired from the trust, and that the new trustee had been validly appointed, *re Williams*, 4 K. & J. 87; *re Bailey*, 3 W. R. 31. But until the Court deals with the fund, he is still trustee for the purpose of receiving notice of incumbrances upon the fund, *Thompson v. Tomkins*, 2 Dr. & Sm. 8, and he cannot get a full discharge, except by proceeding to have his accounts taken, *Barker v. Peile*, *ib.* 340. A trustee paying money into Court is not discharged from liability for past breaches of trust in respect of those moneys, *Att.-Gen. v. Alford*, 2 Sm. & G. 488; 4 D. M. & G. 843; *re Fagg*, 19 L. J. Ch. 175; *re Waring*, 21 L. J. Ch. 784; nor from liability to pay more, if more is due, *Beatty v. Curson*, L. R. 7 Eq. 194; *Goode v. West*, 9 Ha. 378; *Mitchell v. Cobb*, 17 L. T. 25; *re Jephson*, 1 L. T. N.

S. 5; *Thorp v. Thorp*, 1 K. & J. 438. But after payment into Court the remedy of the *c. q. t.* for any past breach of trust, or to compel the recovery of a larger sum than that paid in, is, by suit, *re Jenkins*, 10 Jur. N. S. 332. But see *re Wright*, 1 Sm. & G. app. 5, where an order was made on the petition of the *c. q. t.* for the trustee to pay into Court future instalments of the fund; and *re Chamberlain*, 22 Beav. 286, where an order was made for payment of the income accruing on any future instalments which might be paid in, to the same account. But whether the Court had any jurisdiction to order the payment in of future accruing instalments of the fund, seems doubtful, see *re Lloyd*, 2 Ir. Eq. 507; *re Fortune*, 4 Ir. Eq. 351; Trustee Act, 1850, s. 31.

Where money is paid into Court in a case to which the Act does not apply, the party paying in is not discharged from liability therefor, and the amount paid in may be recovered in a suit brought by the person entitled, notwithstanding the payment of it into Court, *Matthew v. Northern Assurance Co.*, L. R. 9 Ch. D. 80.

But where the person entitled applies for payment out of the fund, the jurisdiction of the Court to deal with the fund is admitted, and an objection that the Act did not warrant its being paid into Court cannot be entertained even on the question of costs, *re Haycock*, L. R. 1 Ch. D. 611.

*Payment out.*—The application for payment out should as a general rule be by petition to the Court, *re Masselin*, 15 Jur. 1073; *ex parte Stock*, 5 Ir. Ch. R. 341; but where the fund is of small amount the application may be made by motion in Chambers, *re Wheeler* before Referee, March, 1879. In England the application is in Chambers where the fund is £300 or under. Where an order has been made by the Court on petition, future proceedings upon it may be taken in Chambers, *re Hodges*, 4 D. M. & G. 491.

The application should be made by the *c. q. t.*, and not by the trustees and where the latter applied at the request of the *c. q. t.* they were only allowed respondent's costs, *re Cazneau*, 2 K. & J. 249; *re Trowes*, 1 L. T. N. S. 54; *re Hutchinson*, 1 Dr. & Sm. 27.

A petition may be presented by a person entitled to an aliquot share without bringing the other parties before the Court, *re Befford*, 21 L. T. 164.

It was held formerly that only the persons named as *c. q. t.* in the trustees' affidavit could apply, *re Jephson*, 1 L. T. N. S. 5; and see *Crause v. Cooper*, 1 J. & H. 207; and that any other claimants must bring a suit, but the later practice of the Court in England has not been in accordance with that rule, see *re Puttrel*, L. R. 7 Ch. D. 647; and any person claiming to be entitled may apply whether named in the trustees' affidavit or not.

A petitioner may proceed *in forma pauperis*, *re Money*, 13 Beav. 109.

The trustees are, generally speaking, entitled to notice of the application, but service on them may be dispensed with in a clear case, *re Young*, 5 W. R. 400; *re Beauclerk*, 11 W. R. 203; *re Thomas*, *ib.* 276; or where the trustee has not been heard of for ten years, *re Bolton*, 18 W. R. 56; or substitutional service may be allowed, *ex parte Baugham*, 16 Jur. 325; *re Lawrence*, 14 W. R. 93; but where the title of a *c. q. t.* as tenant for life is clear the trustees should not appear on his application for payment out of the income, *re Evans*, L. R. 7 Chan. App. 609; *re Battell*, 21 W. R. 138.

All parties named in the trustees' affidavit as being interested in the fund should be notified of an application for payment out of the corpus. But where the parties are numerous leave may be granted to serve some of them on behalf of the class, *re Colson*, 2 W. R. 111; so also service may be dispensed with where the party is abroad and cannot be heard of, *re Hansford*, 7 W. R. 199; *re Naylor*, 28 L. T. N. S. 18.

But the petition may be served if necessary on a party out of the jurisdiction *re Haney*, L. R. 13 Ch. 275. It is not necessary that the remainderman should be notified of an application by the tenant for life for payment out of the income, *re Whitting*, 9 W. R. 830; *re Marnes*, L. R. 3 Eq. 432; *re Hodges*, 6 W. R. 497; *ex parte Fletcher*, 12 Jur. 619.

Where any parties served claim no interest they should not appear, provided they have been paid a sufficient sum to enable them to obtain the advice of a solicitor, (and see Judicature Act, O. L. r. 7), if notwithstanding, they appear they



will get no costs, *re Smith*, 3 Jur. N. S. 659; *re Birch*, 2 K. & J. 369; *re Coventry*, 19 Beav. 158; *Roberts v. Ball*, 24 L. J. Ch. 471; but see *ex parte Queen's Coll.* 6 W. R. 9; *Rudge v. Weedon*, 11 W. R. 819; *Strong v. Strong*, 6 W. R. 455; *Robertson v. Grant*, 3 Ch. Ch. R. 331; and see *Judicature Act O. L. r. 10*.

On an application of a tenant for life for payment of income, the remainderman, although notified, was refused his costs, *re Thornton*, 9 W. R. 475. An order made under the Act has the force of a decree, *re Smyth*, 11 W. R. 850. Upon a petition for payment out, the Court has the same jurisdiction to determine the rights of rival claimants of the fund as upon a bill filed, *Lewis v. Hillman*, 3 H. L. 607, and may direct an issue to try the sanity of a testator, *re Allen*, Kay, app. 51, or may make an order reforming a deed, *re Hoare*, 4 Giff. 254; *re De La Touche*, L. R. 10 Eq. 603; *re Bird*, L. R. 3 Ch. D. 214; or may make an order directing the administration of the fund as in an administration suit, *Hankey v. Morley*, 4 Jur. N. S. 234; *re Trower*, 1 L. T. N. S. 54. The Court may, however, direct a suit to be brought to determine the rights of the parties, *re Fozard*, 24 L. J. Ch. 441; *Thorp v. Thorp*, 1 K. & J. 438; *re Sharpe*, 15 Sim. 470; *re Bloye*, 19 L. J. Ch. 89; or direct a reference to the Master, *re Bolton*, 18 W. R. 56.

Where a trust fund has been paid into Court upon "the trusts of a will," it cannot be paid out except upon a general administration of the testator's estate, or upon the responsibility of the trustees, *re Wright*, 15 Beav. 367; and see *re Edwards*, 4 W. R. 801. But where money was paid in by an executor in ignorance of debts, it was paid out to him again by consent, *ex parte Tournay*, 3 D. & Sim. 677; and a fund paid into Court as part of a testator's estate was ordered to bear a proportionate share of the costs of a suit to administer the estate, *Mutlow v. Mutlow*, 4 D. & J. 539.

Where the person entitled to a fund paid into Court under the Act is a lunatic not so found by inquisition, the appointment of a committee to the estate of the lunatic is not essential as a condition of getting the money out of Court, but a person may be appointed by the Court to act "in the nature of a guardian" of the person and estate of the lunatic to whom the money may be ordered to be paid on his undertaking to apply it for the maintenance, comfort and support of the lunatic, *re Brandon*, L. R. 13 Ch. D. 773.

*Costs.*—The Court has power to award costs of proceedings under the Act, *re Woodburn*, 1 D. & J. 351; *re Armston*, 4 D. J. & S. 454; *re Cater*, 25 Beav. 361, 366.

*Prima facie* the party paying in is entitled to his costs between solicitor and client of payment in, *re Webb*, 14 W. R. 857; *re Cobbe*, 15 W. R. 29; and also of his costs of appearance on the application for payment out, when served, *re Erskine*, 1 K. & J. 302; *re Croyden*, 14 Jur. 54; *re Wyll*, 28 Beav. 458; *re Wright*, 3 K. & J. 419; *re Headington*, 27 L. J. Ch. 175; *re Robertson*, 6 W. R. 405; *re Brocklesby*, 29 Beav. 652. But it is not a matter of course that the party paying in gets his costs, *re Elgar*, 11 L. T. N. S. 415; *re Lane*, 24 L. T. 181; *Hankey v. Morley*, 4 Jur. N. S. 234; *Handley v. Davies*, 5 Jur. N. S. 190; *re Birkett*, L. R. 9 Ch. D. 576. Trustees have been disallowed their costs of appearing on a petition for payment out where they acted with unreasonable caution in paying the fund into Court, *re Leake*, 32 Beav. 135; *re Fagg*, 19 L. J. Ch. 175; *re Heming*, 3 K. & J. 40; *re Metcalfe*, 2 D. J. & S. 122; *re Covington*, 25 L. J. Ch. 238; *re Elliott*, L. R. 15 Eq. 194; *re Cull*, L. R. 20 Eq. 561; and see *Firmin v. Pulham*, 2 D. & Sm. 99; *re Pearson*, 20 L. T. N. S. 8; or have paid the money in to anticipate a bill about to be filed against them, *re Waring*, 21 L. J. Ch. 784; *Att.-Gen. v. Alford*, 2 Sm. & G. 488. Where the payment into Court is not warranted by the Act, the costs of payment in cannot be allowed, *Matthew v. Northern Assurance Co.*, L. R. 9 Ch. D. 80, unless the party entitled to take the objection waives it by applying for payment of the money out of Court, *re Haycock*, L. R. 1 Ch. D. 611. Trustees have been disallowed costs of unnecessary proceedings, *e.g.*, unnecessarily taking copies of affidavits, *re Lazarus*, 3 K. & J. 555; *re Metcalfe*, 3 N. R. 657; and in cases of gross misconduct trustees have been ordered to pay the costs of the petition for payment out, *re Woodburn*, 1 D. & J. 333; *re Cater*, 25 Beav. 361, 366; as where the Court considered the title of the claimant perfectly clear, *re Hoskin*, L. R. 5 Ch. D. 229; *re Foligno*, 32 Beav. 131; *re Elliott*, L. R. 15 Eq. 194; and where the trustees neglected to make reasonable inquiries, *re Knight*, 27 Beav. 45; *re Woodburn*, *supra*; *Beaty v. Curson*, L. R. 7 Eq. 194. But if before paying in the trustee deduct his costs of paying in, the Court may direct the taxation of such costs, *re Huo*, 27 Beav. 337; but it has no



jurisdiction, except upon bill filled, to make any order as to such costs, either for the refunding of the whole or of any excess beyond what may be allowed on taxation, *re Bloye*, 1 Mac. & G. 504; *re Barber*, 9 Jur. N. S. 1099.

Although a trustee cannot be compelled to pay the trust fund into Court, yet where, in a proper case, upon request to do so he refused, and a suit became necessary, the Court refused to allow him any more costs than he would have incurred had he complied with the request, and the plaintiff had applied by petition, *Weller v. Fitzhugh*, W. N. (1870), 144; *Gunnell v. Whitear*, L. R. 10 Eq. 864.

*Out of what fund costs payable.*—The trustees may deduct their reasonable costs of paying the money into Court from the fund, where no dispute has arisen or is likely to arise as to the deduction, *Beaty v. Curson*, L. R. 7 Eq. 194; *re Fortune*, 4 Ir. Eq. 351. The fund paid in, however, is not always the fund out of which the costs of payment in should be deducted, thus where the payment into Court becomes necessary in consequence of a difficulty arising under a will, the trustees costs of payment in should come out of the residuary estate, *re Cawthorne*, 12 Beav. 56; *re Jones*, 2 Drew. 679; *re Trick*, L. R. 5 Chan. App. 170; *re Birkett*, L. R. 9 Ch. D. 576. But where the fund is completely severed, and is paid in by the trustee and not the personal representative, the costs of payment in may come out of the fund itself, *re Lorimer*, 12 Beav. 521.

After some conflict of authority it seems to be now settled that all the costs of an application for payment out of the income (including the costs of the trustees) ought to come out of the income, and the costs of an application for payment out of the corpus should come out of the corpus, *re Mason*, L. R. 12 Eq. 111; *re Whitton*, L. R. 8 Eq. 353; *re Evans*, L. R. 7 Ch. App. 609; *re Smith*, L. R. 9 Eq. 374. But where the title of a tenant for life petitioning for payment out of income is clear, it has been held the trustee ought not to appear, and is not entitled to costs, *re Evans*, L. R. 7 Ch. App. 609; *re Battell*, 21 W. R. 138; and under similar circumstances the costs of a remainderman appearing on such an application have been refused, *re Thornton*, 9 W. R. 475.

costs, either for  
allowed on taxa-

into Court, yet  
t became neces-  
l have incurred  
petition, Weller  
884.

reasonable costs  
has arisen or is  
t; *re* Fortune, 4  
ut of which the  
Court becomes  
trustees costs of  
ne, 12 Beav. 56;  
ett, L. R. 9 Ch.  
by the trustee  
come out of the

all the costs of  
of the trustees)  
or payment out  
, 111; *re* Whit-  
9 Eq. 374. But  
come is clear, it  
costs, *re* Evans,  
r circumstances  
ve been refused,

## An Act for the further relief of Trustees.

(Imp. Stat. 12 & 13 Vic. Cap. 74.)

[28th July, 1849.]

WHEREAS difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an Act passed in the session of Parliament holden in the tenth and eleventh years of the reign of Her present Majesty, intituled "An Act for better securing Trust Funds, and for the relief of Trustees," and it is expedient to make a further provision for carrying into effect the objects of the said recited Act: Be it therefore enacted, etc., that if, upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act it shall appear to the Judge of the Court of Chancery before whom such petition shall be heard that any moneys, annuities, stocks, or securities, are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited Act, and that the major part of such persons are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had, it shall be lawful for such Judge as aforesaid to order and direct such transfer, payment or delivery to be made by the major part of such persons without the concurrence of the other or others of them; and where any such moneys or Government or Parliamentary securities shall be deposited with any banker, broker, or other depository, it shall be lawful for such Judge as aforesaid to make such order for the payment or delivery of such moneys, Government or Parliamentary securities, to the major part of such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General as to the said Judge shall seem meet; and every transfer of any annuities, stocks, or securities, and every payment of money, or delivery of securities, in pur-

suance of any such order, shall be as valid and effectual as if the same had been made on the authority, or by the Act, of all the persons entitled to the annuities, stocks or securities so transferred, or the moneys or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of England, the East India Company, and the South Sea Company, and all other persons acting under or in pursuance of such order.

See *re* Broadwood, 8 L. T. N. S. 632, the non-concurring trustees must be served with the petition, *re* Bryant, W. N. (1868) 123.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.

(Imperial Statute 13 & 14 Vic. Cap. 60.)

[5th August, 1850.]

[1. Section I. repeals 11 Geo. IV. and 1 Wm. IV. c. 60, 4 and 5 Wm. IV. c. 23; 1 and 2 Vict. c. 69.]

[Although the statutes 11 Geo. IV. & 1 Wm. IV. c. 60 and 4 & 5 Wm. IV. c. 23, are repealed by the Imperial Parliament, their provisions are still in force in Ontario so far as applicable, under R. S. O., c. 40, s. 35; 1 & 2 Vict., c. 69, not having been passed until 4th August, 1838, its provisions were never in force in Ontario.]

2. And whereas it is expedient to define the meaning in which certain words are hereafter used: it is declared that the several words hereinafter named are herein used and applied in the manner following respectively: (that is to say,)

The word "lands" shall extend to and include manors, messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein:

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity, in possession or in futurity in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands :

The words "contingent right," as applied to lands, shall mean a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained ; also a right of entry, whether immediate or future, and whether vested or contingent :

The word "convey" and "conveyance," applied to any person shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of His late Majesty King William the Fourth intituled, "An Act for the abolition of fines and recoveries, and the substitution of more simple modes of assurance," and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold land :

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being :

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any Keeper or Lords Commissioners of the Great Seal of Ireland for the time being :

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage ; but, with this exception the words "trust" and "trustee" shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representatives of a deceased person :

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *De lunatico inquirendo* :

The expression "person of unsound mind" shall mean any person, not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate, which would in a Court of Equity be deemed merely a security for money :

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

"Stock" includes shares in joint stock companies, *re* Angelo, 5 D. & Sm. 278.

A mortgagor cannot obtain an order for a conveyance under the Act without suit, under sections which relate only to trustees *re* Osborn, L. R. 12 Eq. 392. But where the mortgage contained a power of sale and a trust to hold the surplus, not for the mortgagor's "heirs and assigns," but for his "executors, administrators and assigns," it was held that there had been a conversion of the mortgagor's estate and that the mortgagee was a trustee within the Act, *re* Underwood, 3 K. & J. 745; and see *re* Crowe, L. R. 13 Eq. 26; *re* Walker, L. R. 3 Ch. D. 209.

In case of constructive trusts of real estate, it would seem that unless the trust be admitted by the alleged constructive trustee, the decree of the Court must be first obtained declaring the trustee; thus, where a vendor of realty died before completion, leaving an infant heir, the Court dismissed a petition to declare the latter a trustee for the purchaser, *re* Carpenter, 1 Kay, 418; *re* Burt, 9 Ha. 289; *re* Dickinson, 17 L. T. 231; *Cust v. Middleton*, 7 Jur. N. S. 151; *re* Weeding, 4 Jur. N. S. 707; *re* Faulder, W. N. (1866) p. 83; *Jackson v. Milfield*, 5 Ha. 538; *re* Milfield, 2 Phil. 254; *re* Wise, 5 D. & Sm. 415; *re* Probert, 22 L. J. N. S. Ch. 948. But when a vendor died before acceptance of the title, having devised the estate to an infant, and the executors prayed that the infant might be declared a trustee, and might on payment of purchase money to the executors, be ordered to convey to the purchaser who had accepted the title and the prayer was supported by the infant's counsel, the Court made the order, *re* Lowry, L. R. 15 Eq. 78. So, also, where the heir of a deceased vendor of realty is of full age, he may, without a suit, be declared trustee for the purchaser, *re* Cumming, L. R. 5 Chan. App. 72; *re* Russell, 12 Jur. N. S. 224; *re* Badcock, 2 W. R. 386.

A vendor who refused to convey after tender of a deed settled by the Judge, or to receive the purchase money, was declared a trustee, and on payment of the purchase money into Court by the purchaser, the vendor's solicitor was ordered to execute the conveyance, *Warrender v. Foster*, 2 Seton (3rd ed.), 822.

An executor holding a legacy bequeathed to persons successively, is a constructive trustee, *re* Davis, L. R. 12 Eq. 214.

An heir who takes by descent, but who has by election bound himself to hold upon the trusts of the will, is a trustee within the Act, *Dewar v. Maitland*, L. R. 2 Eq. 834.

One of several assignees in bankruptcy was held to be a trustee within the Act *re* Joyce, L. R. 2 Eq. 576.

Where a legacy was bequeathed to an infant, which was directed to be invested in consols and paid to him at twenty-one, subject to trusts for maintenance and education, etc., and the executors invested the legacy in consols in the joint names of themselves and the infant and died leaving the infant surviving, the latter was held a trustee within the Act, and the personal representative of the last surviving trustee was appointed under the Trustee Extension Act, 1852, 33, to transfer it into Court, *Gardner v. Cowles*, L. R. 3 Ch. D. 304.

3. And be it enacted that where any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's Sign Manual with the care of the persons and estates of lunatics, to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct;



and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

The Court of Chancery of Ontario possesses the like jurisdiction over lunatics and their property which is conferred in England upon the Lord Chancellor by a commission from the Crown under the sign manual, R. S. O., c. 40, s. 58. It seems to be doubtful, however, whether the Canadian Act confers upon the Court any jurisdiction over lunatics or their property which the Lord Chancellor in England exercises by virtue of any Imperial Statute passed subsequently to 1846. If this statutory jurisdiction be excluded, then of course, the Court of Chancery of Ontario cannot exercise the powers conferred on the Lord Chancellor by sections 3, 4, 5, and 6 of this Act, see *re Waugh*, 2 D. M. & G. 279; *re Pattinson*, 21 L. J. Ch. 280.

Where the fact of lunacy is contested, the case, it is said, is not within the Act, *re Walker*, Cr. & Ph. 147; *re Campbell*, 18 L. T. 202; but see section 52.

The Court has no jurisdiction under this section to vest a power, *re Porter*, 3 W. R., 583.

Where the person is of unsound mind, but not so found by inquisition, and is an infant, the case comes within the ordinary jurisdiction of the Court of Chancery, and not the Lunacy jurisdiction of the Lord Chancellor, *re Arrowsmith*, 4 Jur. N. S. 1123.

4. And be it enacted, that when any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted, as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane and had duly executed a deed so releasing or disposing of the contingent right.

See note to preceding section.

5. And be it enacted, that when any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last

mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint.

See note to Section 3.

6. And be it enacted, that when any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons he may appoint.

See note to Section 3.

7. And be it enacted that, where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

The word "seised" includes an estate tail, *re Sherrard*, 1 D. J. & S. 422; and see *Powell v. Matthews*, 1 Jur. N. S. 973.

Upon the death of a bare trustee of any corporeal or incorporeal hereditament, of which such trustee was seised in fee simple, such hereditaments now vest in the legal personal representative from time to time of such trustee, R. S. O., c. 107, s. 5. For meaning of the expression "bare trustee," see *Christie v. Ovington*, L. R. 1 Ch. D. 281; *Morgan v. Swansea*, L. R. 9 Ch. D. 582. The R. S. O., c. 107, s. 5, differs from the English Land Transfer Act, 1875, s. 48, the latter being confined to trust estates, whereof the bare trustee dies intestate. Under the Revised Statute the power of a bare trustee to devise the trust would appear to be taken away.

The personal representatives of a deceased mortgagee have now power to discharge the mortgage, or to reconvey or transfer the mortgaged estate, R. S. O., c. 107, ss. 15, 16; but see *Dilk v. Douglas*, 26 Gr. 99.

An order vesting the legal estate of an infant remainderman in tail, made with the consent of the tenant for life as protector of the settlement, will bar the entail, *Powell v. Matthews*, 1 Jur. N. S. 973; for form of order, see *Seton*, 809; and see *Hargreaves v. Wright*, 1 W. R. 408; *Singleton v. Hopkins*, 4 W. R. 107; *re Bloomer*, 2 D. & J. 88; 2 David. Con. 214, n; *re Ellerthorpe*, 18 Jur. 669.

Wherever for any reason a conveyance is required, the Court, in lieu of making a vesting order has power to appoint some person to execute a conveyance, see *post* section 21.

8. And be it enacted, that where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery

to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

See notes to section 7.

**9.** And be it enacted, that when any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

When there are joint trustees see section 10.

A coparcener who has no beneficial interest but holds in trust for the other coparcener is solely seised as a trustee for such coparcener, *McMurray v. Spicer*, L. R. 5 Eq. 527. A mortgagee is not a trustee within this section, *re Osborn*, L. R. 12 Eq. 392. But a mortgagee may become a trustee within the Act, see *re Underwood*, 3 K. & J. 745; *re Crowe*, L. R. 13 Eq. 26. An heir on whom trust estates descend by reason of the disclaimer of the devisees in trust is a trustee within this section, *Wilks v. Groom*, 6 D. M. & G. 205; *Hooper v. Strutton*, 12 W. R. 367; and an heir of a mortgagee who had taken possession was held to be trustee for the mortgagee's executors, *re Skitter*, 4 W. R. 791; and see *re Hodges*, 1 Gr. 285.

An absconding mortgagor was declared a trustee for his equitable mortgagee after a decree for foreclosure, and an order was made vesting in the latter the legal estate, *Lechmere v. Clamp*, 31 Beav. 578; S. C. 30 Beav. 218; *Smith v. Boucher*, 1 Sm. & G. 72; *re Underwood*, 3 K. & J. 745.

The heir of a vendor who had contracted to sell an estate and subsequently died intestate before conveyance, was held to be a trustee for the personal representative, *re Badcock*, 2 W. R. 386; and see *re Lowry*, L. R. 15 Eq. 78; but under such circumstances the heir is not trustee for the purchaser unless so declared by a decree of the Court, *re Carpenter*, 1 Kay, 418; and see *Lysaght v. Edwards*, L. R. 2 Ch. D. 499; *Christie v. Ovington*, L. R. 1 Ch. D. 281; *Morgan v. Swansea*, L. R. 9 Ch. D. 582.

A temporary absence, *e.g.* a sailor absent on a voyage is not within the Act, *Hutchinson v. Stephens*, 5 Sim. 499. Where the absent trustee was lunatic it was held the Court of Chancery had jurisdiction to appoint a new trustee in his stead *re Gardner*, L. R. 10 Ch. D. 29.

**10.** And be it enacted, that when any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons, together with any other person or persons, in such manner and

for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

The words "upon any trust" seem to have been accidentally omitted after the word "lands" in the second line.

A mortgagee is not a trustee within the section, see *re Osborn*, L. R. 12 Eq. 392. Where one of several trustees is out of the jurisdiction, and a new trustee is appointed in his place, the Court will vest the outstanding legal estate in the continuing and new trustee as joint tenants, *Smith v. Smith*, 3 Drew. 72; *re Fisher*, 1 W. R. 505; overruling, *re Watts*, 9 Ha. 106; *re Plyer*, 9 Ha. 220. Even though the new trustee is not appointed by the Court, *re Marquis of Bute's will*, Johns. 15. As to power of Court to order a conveyance in lieu of making a vesting order, see *post* section 21.

A temporary absence is not within the Act, *Hutchinson v. Stephens*, 5 Sim. 499. cited *supra*.

**11.** And be it enacted, that when any person solely entitled to a contingent right in any lands upon any trust, shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

The Court has power to appoint a person to execute a conveyance releasing such contingent right, in lieu of making an order under this section, see *post* section 21.

**12.** And be it enacted, that when any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

**13.** And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons

in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

14. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any trust and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

15. And be it enacted, that when any person seised of any land, upon any trust, shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate.

Leaseholds are not within this section, *re* Mundell, 8 W. R. 683; *re* Harvey, Seton (3rd ed.) 819; but a vesting order of leaseholds may be made on the appointment of new trustees under section 34.

Trust estates held by "bare trustees" now pass to their personal representatives, see R. S. O., c. 107, s. 5. As to the meaning of the expression "bare trustees," see *Christie v. Ovington*, L. R. 1 Ch. D. 281; *Morgan v. Swansea*, L. R. 9 Ch. D. 582.

When a mortgagee had entered into possession and died, leaving an heir out of the jurisdiction, a vesting order was made under the 9th section in favour of the executors of the deceased mortgagee, *re* Skitter, 4 W. R. 791; but when the mortgagee left no heir a vesting order in favour of the mortgagee's personal representative was made under this section, *re* Keeler, 11 W. R. 62; but see *re* Hodges, 1 Gr. 285; and as to right of the personal representative of a deceased mortgagee over mortgaged estates, see R. S. O., c. 107, ss. 15, 16.

16. And be it enacted, that when any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seized or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class

of unborn persons would upon coming into existence be seised or possessed of in such lands.

See note to Section 30.

[17 and 18. Repealed by the Trustee Extension Act, 1852, s. 2, and were consequently never in operation in Ontario.]

19. And be it enacted, that when any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last mentioned person shall consent to an order for the reconveyance of such lands, then, in any of the following cases, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found:

When an heir or devisee of such mortgagee shall upon a demand by a person entitled to require a conveyance of such lands, or a duly authorized agent of such last mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last mentioned person:

When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee:



And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee (as the case may be), had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

See R. S. O. c. 107, ss. 15, 16, as to power of the personal representative over the mortgaged estate, *Dilk v. Douglas*, 26 Gr. 99.

When the mortgagee had entered into possession and died leaving an heir, resident out of the jurisdiction, an order vesting the legal estate in the personal representative of the mortgagee was made under sec. 9, *re Skitter*, 4 W. R. 791; and when the mortgagee left no heir, an order vesting the mortgaged estate in the personal representative of the deceased mortgagee was made under Sec. 15, *re Keeler*, 11 W. R. 62. But see *re Hodges*, 1 Gr. 285.

An order will be made under this section vesting the legal estate in the personal representatives of the deceased mortgagee who had not taken possession, notwithstanding the mortgage debt has not been paid, *re Boden*, 9 Ha. 820; 1 D. M. & G. 57; *re Hewitt*, 27 L. J. Ch. 302; *re Lea*, 6 W. R. 482; or in favour of an assignee of the personal representative of the mortgagee, *re Quinlan*, 9 Ir. Ch. R. 306; overruling, *re Meyrick*, 9 Ha. 116; and see *re Dearden*, 3 M. & K. 508.

Trust property does not escheat to the Crown, see *post* sec. 46.

As to the meaning of the word "devisee" see interpretation clause, s. 2.

20. And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall under any of the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery (as the case may be), should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock, transferable in the books of the Governor and Company of the Bank of England, or of any company or society established, or to be established; it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary or account-



ant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto.

When a vesting order had been granted, it was subsequently vacated and a conveyance ordered for the purpose of expressing reservations as to mines, *Turpin v. Speakman*, Seton, (4th ed.) 534.

The conveyance under this section should contain a recital shewing that it was made in obedience to the order of the Court and should be executed by the trustee appointed to convey in his own name, *Lewin* (6th ed.) 856, but see *Ex parte Foley*, 8 Sim 395; and for form of order *Hancox v. Spittle*, 3 Sm. & G. 478; *Shepherd v. Churchill*, 25 Beav. 21.

[21. Relates to lands in Lancaster and Durham.]

22. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery, or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose in action upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last mentioned person or persons together with any person or persons the said Court may appoint; and when any sole trustee of any stock or chose in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

See sections 9, 10, 14, which confer similar powers on the Court in respect to lands.

Where there are several trustees, one of whom is out of the jurisdiction, the Court cannot for that reason vest the chose in action in the *cestui que trust* alone, even though he be absolutely entitled, *re Brass*, 4 W. R. 764. But where all the trustees were dead an order was made vesting stock in the *cestui que trust* who was absolutely entitled, *re Ryan*, 9 W. R. 137; and see *ex parte Bradshaw*, 2 D. M. & G. 900; but the authority of *re Ryan* is questioned, see *Lewin* (6th ed.) p. 858, note (d).

Where one of four trustees was out of the jurisdiction an order was made vesting in the other three the right to receive the dividends accruing during their lives, *re Peyton*, 2 D. & J. 290; 25 Beav. 317.

Where B, one of two trustees, was dead but the Master found that it was uncertain whether A, the other trustee was living or dead, the Court refused to treat A as a sole trustee under the 22nd section, it being uncertain whether he survived B, *re Randall*, 1 Drew. 401.

The order should recite the fact by reason of which the order is made, *e.g.*, the absence of the trustee from jurisdiction, *re Mainwaring*, 26 Beav. 172.

This section does not apply where the absent trustee is an infant or lunatic, *Cramer v. Cramer*, 5 D. & S. 312; but see "Trustee Extension Act, 1852," s. 3 *post*.

**23.** And be it enacted, that where any sole trustee of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the Court may appoint.

It has been held that this section applies not only to the case of a sole trustee, but also to the case of several trustees who all refuse to comply with a written request to receive dividends, etc., *re Hartnall*, 5 D. & S. 111. Where the application is made in consequence of a refusal on the part of the trustees to receive dividends, the Court has only jurisdiction to make an order affecting dividends accrued prior to the delivery of the written request to the trustees, and has no jurisdiction over the future dividends, *re Hartnall*, 5 D. & S. 111.

See, "Trustee Extension Act, 1852," s. 4, *post*, which extends the power of the Court to make orders vesting stock, etc., in cases where the trustee refuses to obey the order of the Court.

Duly appointed new trustees of the stock sought to be transferred are persons absolutely entitled, *re Russell*, 1 Sim. N. S. 404; *re Baxter*, 2 Sim. & G. app. 5; *re Ellis*, 24 Beav. 426; but a tenant for life is not, except for the purpose of an application limited to the income; nor is one of two trustees, *Mackenzie v. Mackenzie*, 5 D. & S. 338.

The refusing trustee need not be served, *re Baxter*, *supra*; *ex parte Armstrong*, 16 Sim. 296; *re Crowe*, L. R. 13 Eq. 26.

**24.** And be it enacted, that where any one of the trustees of any stock or, chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such

chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

The refusal of two out of three executors to transfer stock, does not give the Court jurisdiction to vest the rights of the trustees in the person beneficially entitled, *re Nicholls*, 18 W. R. 443; even though the third trustee be a lunatic, *Id.* Where the application is made on the ground of a refusal to receive dividends, it would seem that the Court has no power to make any order, except as to dividends accrued prior to the making of the written request, *re Hartnall*, 5 D. & S. 111.

Where one of three executors of a surviving trustee of canal shares became lunatic and the other two refused to act, an order was made under this section vesting the shares in the parties beneficially entitled, *re White*, L. R. 5 Ch. App. 698.

**25.** And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

Where the executor of a surviving trustee has not proved, and declines to say whether he intends doing so, and has neglected to transfer, order may be made under this section, *re Ellis*, 24 Beav. 426; *Cockell v. Pugh*, 6 Beav. 293; *re Lunn*, 15 Sim. 464. Where the survivor of two trustees died, leaving no personal representative, the person beneficially entitled was appointed trustee under this section, *re Dixon*, 21 W. R. 220; *re Kadeheim, Blake*, V. C., 6 November, 1878; and see *re Rathbone*, L. R. 2 Ch. D. 483, as to form of vesting order of personalty, where there is no personal representative of the deceased trustee, see also *re Dalgleish*, L. R. 4 Ch. D. 143. And where the survivor of two trustees of stock under a will died intestate, and no personal representative had been appointed to his estate, on the application of the *cestui que trust* and two new trustees who had been appointed under the will, praying that the right to transfer the stock might be vested in the latter, the Master of the Rolls held it necessary that the new trustees should formally retire and be re-appointed by the Court, and that thereupon the right to a transfer could be vested in them. This was done by an order, *re Crowe*, 42 L. T. N. S. 822.

**26.** And be it enacted, that where any order shall have been made under the provisions of this Act, vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his

or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order: and the Bank of England, and all companies and associations whatever, and all persons shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

An order vesting the right to transfer a fractional part of a dividend of stock was varied on the appeal of the Bank, and the new trustees were empowered to receive the whole of the dividends, and were directed to retain only such part as was subject to the trust, *re Stewart*, 8 W. R. 425.

**27.** And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action, or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity, for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

[28. Relates to copyhold lands.]

**29.** And be it enacted, that when a decree shall have been made by any Court of Equity, directing the sale of any lands

for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed to be so seised, or possessed, or entitled, as the case may be, upon a trust within the meaning of this Act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

A sale for costs of suit is not within this section, *Weston v. Tiler*, 5 D. & Sm. 608; but see "Trustee Extension Act," 1852, s. 1, which extends the provisions of this section to sales under decrees or orders "for any purpose whatever," *Wake v. Wake*, 17 Jur. 545.

Such an order was made without petition in *Wood v. Beetlestone*, 1 K. & J. 213; but see *Gough v. Bage*, W. N. (1871) p. 237.

**30.** And be it enacted, that where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime, a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of this Act; and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might, under the provisions of this Act, make concerning the estates, rights, and interest of trustees born or unborn.

See Extension Act. sec. 1, which extends to any order of the Court.

Orders under this section may be made in suits without any separate proceeding under the Act, *Harrison v. Smith*, 17 W. R. 646; thus in partition suits an infant entitled to a share, may be declared a trustee of such parts of the property as are allotted to other parties, *Bowra v. Wright*, 4 D. & S. 265; so where the shares were minute and complicated the Court declared each of the parties trustees as to the shares allotted to the other of them, and vested the whole in a single trustee with directions to convey to each of the parties their allotted shares, *Shepherd v. Churchill*, 25 Beav. 21; and see *Orger v. Sparke*, 9 W. R. 180; and *Hubbard v. Hubbard*, 2 H. & M. 38; so in a foreclosure suit by an equitable mortgagee by deposit, the Court on making absolute a decree nisi for foreclosure directed a conveyance and

added a declaration that the mortgagor was a trustee for the plaintiff, and made an order vesting his interest in the plaintiff, *Lechmere v. Clamp*, 30 Beav. 218; S. C. 31 Beav. 578; but in another case the Court required a separate application to be made, *Smith v. Boucher*, 1 Sm. & G. 72.

Under R. S. O., c. 40, s. 101, the Court has power to make a vesting order wherever it has authority to order the execution of a conveyance.

The Court has power to declare a person to be a constructive trustee, by order on petition, and to make an order vesting his interest, without suit, *re Angelo*, 5 D. & Sm. 278, where a mortgagor of shares, resident out of the jurisdiction, was on the petition of the purchaser thereof from the mortgagor, declared a constructive trustee for such purchaser. So where a contract for sale of land is executed, by payment of the purchase money, the vendor's heir was declared a trustee for the purchaser without suit, *re Cuming*, L. R. 5 Ch. App. 72; and see *re Crowe*, L. R. 13 Eq. 26; *re Russell*, 12 Jur. N. S. 224; *re Lowry*, L. R. 15 Eq. 78; and see *Lysaght v. Edwards*, L. R. 2 Ch. D. 499, where the question as to how far the heir of a vendor who dies before completion is a trustee for the purchaser is fully considered.

Where the equitable estate was clearly in the petitioner, the holder of the legal estate was on petition declared a trustee, *re Wilkinson*, 12 W. R. 527.

But the Court has refused to make such a declaration on petition against an infant heir of an alleged vendor of realty, and required the rights to be ascertained by a suit, *re Carpenter*, Kay 418; *re Weeding*, 4 Jur. N. S. 707; *Cust v. Middleton* 9 W. R. 242; *re Draper*, 9 W. R. 805; and the Court has also refused, on a petition, to declare the infant heir of a deceased partner, where surviving partner had exercised a right of purchasing the partnership property given him by the articles of partnership, a constructive trustee for the surviving partner, *re Burt*, 9 Hare 289; So where property had been purchased by a father in his son's name the Court refused, on petition, to declare the son a trustee for the father, although a decree was afterwards made in the suit to that effect, *Collinson v. Collinson*, 3 D. M. & G. 409; but see *re De Visme*, 2 D. J. & S. 17.

So also where a conveyance had been taken in the name of the manager of a Bank upon a secret trust for the Bank, but the trust was not evidenced by a writing, the Court refused, on the petition of the Bank, to declare the infant heir of the deceased manager to be a trustee for the Bank, and directed a bill to be filed, *re Greer, Vankoungnet*, C. May, 1868.

As to the power of the Court to bind the interests of unborn persons, see *Harveaves v. Wright*, 1 W. R. 408; where on a bill filed by purchasers from a father and son, having a joint power of appointment under a settlement, against the infant heir in tail of the son, who had died before the completion of the purchase, the Court made an order discharging the estate from the contingent rights of the unborn claimants under the settlement, and appointed a person to convey in the place of the infant, *Wake v. Wake*, 1 W. R. 283. The word "unborn" includes right heirs of living persons, who cannot be ascertained, and therefore cannot be made parties to a suit, *Basnett v. Moxon*, L. R. 20 Eq. 182; *Lees v. Coulton*, *Id.* 20.

**31.** And be it enacted that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which orders under this Act are enforced.

The Court may order a person to whom a fund is paid to pay it into Court under the Trustees Relief Act, see *re Thornton*, 9 W. R. 475; *re Draper*, *ib.* 805; but an order for payment direct into Court has been refused *re Parby*, 29 L. T. 72; see however *re Pitt*, 1 Jur. N. S. 1155; *re Dawson*, 3 N. R. 397.



**32.** And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees.

The Court will not upon petition consider the validity of the instrument creating the trust, *re Matthews*, 26 Beav. 463; *re Harrison*, 22 L. J. 69; and see *Att.-Gen. v. Ward*, 6 Ha. 477. Neither will the Court on petition appoint a new trustee upon any ground not appearing on the face of the instrument, *e.g.*, on the ground of the trustee's misconduct, *re Bridgman*, 1 Dr. & Sm. 164; *Legg v. Mackrell*, 1 Giff. 165; nor because of disagreements between the trustee and *cestui que trust*, *Forster v. Davies*, 4 D. F. & J. 133; or because the donee of the power is about to exercise it corruptly, *re Hodson*, 9 Ha. 118; *re Hadley*, 5 D. & Sm. 67; but where the parties having the power of appointing new trustees were resident in India the Court made an order, *re Humphrey*, 1 Jur. N. S. 921. Nor will the Court on petition remove a trustee without or against his consent, *re Blanchard*, 3 D. F. & J. 131; *re Garty*, 10 L. J. N. S. 331; *re Dennis*, 12 W. R. 575. In such cases a bill must be filed, but see *re Byrne*, 18 L. T. N. S. 630; *re Bignold*, W. N. (1872) 31.

The Court has appointed new trustees where a vesting order could not otherwise have been obtained, *King of Hanover v. Bank of England*, L. R. 8 Eq. 350; but see *re Rathbone*, L. R. 2 Ch. D. 483; *re Driver*, L. R. 19 Eq. 352, where vesting orders were granted, although there was no one who had an existing estate or interest. New trustees have also been appointed where there was great difficulty in obtaining administration to the estate of a deceased trustee, *re Matthews*, 26 Beav. 463; *Davis v. Chanter*, 6 W. R. 416; 4 Jur. N. S. 272; so also where there is no personal representative of the last surviving trustee, *re Davis*, L. R. 12 Eq. 214. The Court will generally appoint a new trustee in the place of an infant, *re Porter*, 2 Jur. N. S. 349; even though appointed by the settler himself, *re Gartside*, W. N. (1866) 196; but the order should be without prejudice to an application by the infant on his coming of age to be restored to the trust, *re Shelmerdine*, 33 L. J. Ch. 474. The residence of the trustee out of the jurisdiction is not always a ground for appointing another in his place, *re Mais*, 16 Jur. 608; *re Moravian Society*, 26 Beav. 101; *re Watt*, 9 Ha. 106; see *re Lincoln P. Methodists*, 1 Jur. N. S. 1011; *Withington v. Withington*, 16 Sim. 104.

But where the trustee was residing permanently abroad, that was held to incapacitate him from acting as trustee of property in England, *Mennard v. Welford*, 1 Sm. & G. 426; and he may, under such circumstances, be removed without his consent, *re Bignold*, L. R. 7 Ch. App. 223; and when one of the trustees had gone to Australia, and it was not known where he was, a new trustee was appointed in his place, *re Harrison*, 22 L. J. Ch. 69; and see *re Joyce*, L. R. 2 Eq. 876. Where the power to appoint new trustees, given in the instrument, fails to meet the case which happens, the Court may act, *re Woodgate*, 5 W. R. 448; *Cooper v. Macdonald*, 14 W. R. 755; *Travis v. Illingworth*, 2 Dr. & Sm. 345; *re Dawson*, 3 N. R. 397; or where the donee of the power is lunatic, so found by inquisition, the Court may appoint, *re Sparrow*, L. R. 5 Chan. App. 662.

Where proceedings under a bankruptcy were suspended and a trustee was appointed by resolution of creditors to wind up the estate and the trustee died, the Court appointed a new trustee in his place, *re Raphael*, L. R. 9 Eq. 233; and see *re Price*, L. R. 6 Eq. 460.

Where a trustee has become bankrupt, he may be removed and a new trustee appointed in his place, *re Renshaw*, L. R. 4 Chan. App. 783; *Harris v. Harris*, 29 Beav. 107; but where a bankrupt had obtained a first-class certificate of discharge, and had subsequently been appointed to positions of trust, a petition for his removal on the ground of his having been bankrupt was refused, *re Bridgman*, 1 Dr. & Sm. 164. The power conferred by the English Bankrupt Act of 1849, s. 130, on the Lord Chancellor to appoint new trustees in place of bankrupt trustees was held to be exercisable by the Court of Chancery, see *re Bridgman*, 1 Dr. & Sm. 168-9.



Where the application is made in consequence of the trustee refusing to act, the disclaimer may be made at the bar of the Court, *Foster v. Dawber*, 1 Dr. & Sm. 172; *re Barnes*, Seton (4th ed.), 542.

Many cases in which it would formerly have been necessary to apply to the Court to appoint new trustees are now provided for by R. S. O., c. 107, s. 3.

Among the principles by which the discretion of the Court is guided in appointing new trustees, are the following:—

*First*, in selecting a person for the office, the Court will have regard to the wishes of the author of the trust, expressed in or plainly deducible from the instrument creating it. *Second*, the Court will not appoint a person with a view to the interest of some one of the *c. q. t.* in opposition to the interest of others. *Third*, the Court will have regard to whether the appointment will promote or impede the execution of the trust. But *semble* the mere fact of the continuing trustee refusing to act with the proposed new trustee would not be sufficient to induce the Court to refrain from appointing him, *re Tempest*, L. R. 1 Chan. App. 485.

The Court will appoint two trustees instead of one, *re Tunstall*, 4 D. & Sm. 421; *Plinty v. West*, 16 Beav. 356; *ex parte Wilkinson*, 2 Deac. 151; *Birch v. Cropper*, 2 D. & Sm. 255; *Grant v. Grant*, 34 L. J. Ch. 641; and where the trust property had greatly increased two trustees were appointed in addition to two existing trustees; *re Bathurst*, 2 Sm. & G. 169; *re Boycott*, 5 W. R. 15. But the Court will not appoint one trustee in place of two, *re Ellison*, 2 Jur. N. S. 62; *re Porter*, *ib.* 349; *re Tunstall*, 15 Jur. 645; *re Dickenson*, 1 Jur. N. S. 724. But two have been appointed instead of three where no active duties remained to be performed, *Bulkely v. Earl of Eglinton*, 1 Jur. N. S. 994; *re Marshall*, W. N. (1868) 125; *re Marriott's trusts*, *ib.* 215, and where one of three trustees wished to retire the Court appointed the two continuing trustees to act in place of the three, *re Stokes*, L. R. 13 Eq. 333; and see *Emmett v. Clarke*, 9 W. R. 515; 7 Jur. N. S. 404; *re Harford's trusts*, L. R. 13 Ch. D. 135; but in the later case, *re Colyer*, 43 L. T. 454, the Court refused to follow, *re Stokes* and *re Harford*.

As a general rule the Court will not appoint a sole trustee, *Grant v. Grant*, 6 N. R. 347; *re Dickinson*, 1 Jur. N. S. 724; but where the trust was shortly to be wound up, and there had originally been only one trustee, the Court appointed a sole trustee in the place of a lunatic trustee, *re Reynault*, 16 Jur. 233.

A trustee may be appointed by the Court of one or more specific trusts created by an instrument, and not of the entire trusts created thereby, *re Cotterill*, 12 W. R. 515; but see *re Garty*, 10 L. T. N. S. 331; *re Dennis*, 12 W. R. 275; *Parnell v. Hingston*, 3 Sm. & G. 337.

The Court will not generally appoint as trustee a foreigner resident abroad, *re Guibert*, 16 Jur. 852; but see *re Drewe*, W. N. (1876) 168; R. S. O., c. 97; but where the beneficiary resided abroad, and the trust property was to be invested in foreign securities, trustees resident in the same place as the beneficiary were appointed by the Court, *re Smith*, W. N. (1872) 134; *re Liddiard*, 42 L. T. N. S. 621.

A woman, although unmarried, will not be appointed sole trustee, *Brook v. Brook*, 1 Beav. 531; and see *Lewin* (7th ed.) 34, 719; *Lake v. De Lambert*, 4 Ves. 592; but an unmarried lady may be appointed jointly with another trustee, *re Campbell*, 31 Beav. 176; *re Berkeley*, L. R. 9 Chan. App. 720.

The husband of a *cestui que trust* was appointed trustee jointly with another on his undertaking that he would, in the event of becoming sole trustee, immediately take steps for the appointment of a co-trustee, *re Hattatt*, W. N. (1870) 14; and one of the firm of solicitors acting for the petitioners was appointed, *re Brentnall*, W. N. (1872) 77.

A *cestui que trust* may, under special circumstances, be appointed, *ex parte Clutton*, 17 Jur. 988; *ex parte Conybeare*, 1 W. R. 458; *Forster v. Abraham*, L. R. 17 Eq. 351; as to appointing a near relative of the parties interested, see *Wilding v. Bolder*, 21 Beav. 222; *re Hattatt*, W. N. (1870) 14. A trustee appointed out of Court was reappointed by the Court for the purpose of making a vesting order, *re Mundell*, 2 L. T. N. S. 653; *re Dalgleish*, L. R. 4 Ch. D. 143; (but see *re Driver*, L. R. 19 Eq. 352, where the Court refused to do this, but appointed an additional trustee, and then made a vesting order) but evidence of fitness is required in such a case, *re Maynard*, 16 Jur. 1084; *re Dalgleish*, *supra*; an affidavit of a third party of the willingness of the proposed trustee to act is insufficient, the written consent to act of the proposed new trustee, duly verified by affidavit, must be produced,

unless counsel appear to consent on his behalf, *re Parke*, 21 L. T. 218; but the trustee need not appear, *re Draper*, 2 W. R. 440; an affidavit of fitness must also be produced, *re Battersby*, 16 Jur. 900; *re Tunstall*, 15 Jur. 645, 981; as a general rule the affidavit of fitness by the solicitor of the petitioner is not enough, *Grundy v. Buckeridge*, 22 L. J. Ch. 1007.

The Court can now appoint new trustees under this section, although there are no existing trustees, and even though the trustees named by a testator all died in his lifetime, see *Trustee Extension Act, 1852, s. 3, post*; *re Smirthwaite*, L. R. 11 Eq. 251; but in such a case the heirs-at-law must be served, *Gunson v. Simpson*, L. R. 5 Eq. 332. So where the testator had appointed executors, but no trustees, trustees were appointed by the Court, *re Davis*, L. R. 12 Eq. 214; *Dodkin v. Brunt*, L. R. 6 Eq. 580; *re Gillett*, 25 W. R. 23.

**33.** And be it enacted that the person or persons who, upon the making of such order as last aforesaid shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by a decree in a suit duly instituted.

A discretionary consent to be given by "the undersigned trustees," is annexed to the office and may be given by a trustee appointed by the Court, *Byam v. Byam*, 19 Beav. 66; but trustees appointed by the Court were held not to have the right to exercise a power to appoint trustees in their own place, *Oglander v. Oglander*, 2 D. & Sm. 381; *Newman v. Warner*, 1 Sim. N. S. 457; but see now R. S. O., c. 107, s. 3.

**34.** And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate, as the Court shall direct; and such order shall have the same effect as if the person or persons (who before such order were the trustee or trustees, if any) had duly executed all proper conveyance and assignments of such lands for such estates.

An order was made under this section where a trustee appointed by the parties was re-appointed by the Court, *re Clay*, W. N. (1873) 129; *re Dalglish*, L. R. 4 Ch. D. 143; and where a mortgagee's executors had been ordered to transfer the mortgage debt to the trustees of a settlement, it was held that this was the appointment of new trustees by the Court and a vesting order of the mortgaged property was made under this section, *re Hughes*, 2 H. & M. 695.

It has been said that before the Court will make an order vesting a trust estate in another trustee in place of one declining to act, the latter must execute a formal deed of disclaimer, *re Badcock*, 2 W. R. 386; *re Ellison*, 2 Jur. N. S. 62; but this has been doubted, see *Foster v. Dawber*, 1 Dr. & Sm. 172.

The Court may make an order divesting the whole estate from the continuing and incapacitated trustee, and vesting it in the new and continuing trustees as joint tenants, *Smith v. Smith*, 3 Drew. 72; *re Fisher*, 1 W. R. 505; but the Court has no power to direct how the trust shall be executed, *re Taylor*, 2 D. F. & J. 125.

The Court will under this section make an order vesting leaseholds in a new trustee appointed by the Court in place of a deceased sole trustee, notwithstanding no personal representative of the latter's estate may have been appointed, *re Dalglish*, L. R. 4 Ch. D. 143. This decision was followed by *Jessel, M. R.*, in *re Hilliard*, 42 L. T. N. S. 79; he, however, at the same time expressed himself as unable to find any power in the Act enabling him to make the order.

**35.** And be it enacted, that it shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees either by the same or any subsequent order to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for and recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees.

The Court has power under this section to vest the right as to stock standing in the name of a deceased person who has no personal representative, *re Herbert*, 8 W. R. 272; *re Kadeheim*, Blake, V. C., 6th Nov., 1878.

The Court will not make a vesting order which would lend any sanction to a past breach of trust, *re Harrison*, 22 L. J. Ch. 69; a vesting order vests estate from the date of the order, *Woodfall v. Arbuthnot*, L. R. 3 P. & D. 108.

Under this section the Court has no power to vest the right to the stock itself, but only the right to call for a transfer, in which respect this section differs from section 29 *ante*, *re Smyth*, 4 D. & Sm. 499; but this difficulty is now removed by the Trustee Extension Act, section 6.

**36.** And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

**37.** And be it enacted, that an order under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

On the application for the appointment of new trustees, all the *cestui que trusts* should be co-petitioners (those under disability petitioning by their next friends or in the case of a lunatic so found, by his committee), *re Fellows*, 2 Jur N.S. 62; *re Wheeler*, 1 D. M. & G. 434; or they must be served; but when the beneficiaries are numerous some may petition for the class, *Jones v. James*, 9 Ha. app. 80; but the committee of a lunatic *c. g. t.* is not beneficially interested within the meaning of this section, *re Bourke*, 2 D. J. & S. 426; any person having a contingent interest in real estate may petition for the appointment of a new trustee, *re Sheppard*, 11 W. R. 60 4 D. F. & J. 423; compare *Ross v. Ross* 12 Beav. 89; *Allan v. Allan*, 15 Ves. 130; *Davies v. Angell*, 31 L. J. Ch. 613.

[38. and 39. Relate to proceedings before the Master, whose office was abolished by Imperial Statutes, 15 and 16 Vic. c. 80; and the provisions of these sections were consequently obsolete at the time the provisions of this Act were introduced into Ontario. See R. S. O. c. 40, s. 36.]

40. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he so think fit, present a petition, in the first instance to the Court of Chancery, or the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said Court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

Affidavits filed in a cause were allowed to be used as evidence on a petition, *re Pickance*, 10 Ha. app. 35; and see *re Hoskins*, 4 D. & J. 436. A petition may after it has been presented be amended, by order of the Court, by adding co-petitioners without being re-answered, *re Carpenter*, 8 W. R. 492.

The general rule is that all the *c. q. t.* should be served, *re Richards*, 5 D. & S. 636; *re Sloper*, 18 Beav. 596; *re Maynard*, 16 Jur. 1084; *re Fellows*, 2 Jur. N. S. 62; and see *re Lonsdale*, 14 Jur. 1101; *re Thomas*, 15 Jur. 187; *re Prescott*, 19 L. T. 371. Where infants are interested a guardian *ad hoc* must be appointed, and the latter must be served, but not the infants. In the case of retiring trustees, the old trustees should be served, *re Sloper*, 18 Beav. 596. When the *c. q. t.* were abroad, *ex parte Hardman*, 3 Mon. Deac. & DeG. 559; *re Richards*, 5 D. & S. 636; but where the *c. q. t.* are numerous, service on some may be dispensed with, *re Sharpley*, 1 W. R. 271; *re Smyth*, 2 D. & S. 781. On applications by lessees or tenants for life the reversioner or remainderman must be served, *re Farrant*, 20 L. J. Ch. 532; *re Maynard*, 16 Jur. 1084; *re Prescott*, 19 L. T. 375; but see *re Pryse*, L. R. 10 Eq. 531; where the lease did not prohibit assignment, a vesting order of the lessee's interest was made in the absence of the lessor, *re Matthews*, 2 W. R. 85; so also an order to vest lands subject to an annuity may be made in the absence of the annuitant, *re Winteringham*, 3 W. R. 578; *re Marshall*, 3 D. & S. 670.

A petition as to lands vested in a lunatic trustee must be served upon the committee, *re Saumarez*, 8 D. M. & G. 390; *re Wylde*, 5 D. M. & G. 25; *re Wood*, 3 D. F. & J. 125; *re Parker*, 32 Beav. 680; but in another case service on the lunatic or his committee was deemed unnecessary, *re East*, L. R. 8 Chan. App. 735. In case of the bankruptcy of a trustee, service must be made on his assignee, *ex parte Carden*, 12 Jur. 391; and on the bankrupt, *ex parte Whitby*, 1 Dea. 478; *ex parte Harris*, 11 L. J. B. 16. The guardian of the infant heir of a deceased trustee need not be served with the petition for appointment of new trustees, *re Little*, L. R. 7 Eq. 323.

41. And be it enacted, that upon the hearing of any such motion or petition it shall be lawful for the said Court or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court or for the

said Lord Chancellor to direct such motion or petition to stand over to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court, or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

42. And be it enacted, that upon the hearing of any such motion or petition whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

43. And be it enacted, that whensoever, in any cause or matter, either by the evidence adduced therein, or by the admission of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court, to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause or of any petition or motion in the said cause or matter, to make such order under this Act.

An order may be made in a suit without petition, *Wood v. Beestlestone*, 1 K. & J. 213; *Collard v. Roe*, 4 Jur. N. S. 431; 4 D. & J. 525; *Lechmere v. Clamp*, 30 Beav. 218; *Hargreaves v. Wright*, 1 W. R. 408; *Hughes v. Wills*, 2 W. R. 575; but see *Gough v. Bage*, W. N. (1871) p. 237; Judge in Chambers held to have no jurisdiction in an administration suit to make an order vesting the right to transfer stock, *Frodsham v. Frodsham*, L. R. 15 Ch. D. 317; and where the property is vested in a lunatic, in England, it is held there must be a petition in lunacy, *Jeffries v. Drysdale*, 9 W. R. 428; as to whether the Court of Chancery of Ontario has power to execute the powers respecting lunatics conferred by this Act on the Lord Chancellor, see *ante*, note to section 3.

44. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee, or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the

Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order : Provided always that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of lands conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such land or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

As to orders made under the Act, founded on certain allegations, being conclusive evidence of the matters contained in these allegations, see *Collinson v. Collinson*, 3 D. M. & G. 409, 419.

**45.** And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock or chose in action in the trustee or trustees of any charity or society, over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorizing the said Court to make an order to that effect in a summary way upon petition.

**46.** And be it enacted, that no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to Her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place.

Where an illegitimate mortgagee in fee, devised her real and personal estate on trust and died without issue, the Court vested the legal estate in the mortgage premises in a purchaser, the mortgage debt having been paid off, *re Minchin*, 2 W. R. 179; but see R. S. O., c. 99, s. 5; and R. S. O., c. 107, s. 15, 16, enabling the personal representative to discharge mortgages; but where the devisee in trust named in the will of a bastard predeceases his testator, it is said a vesting order cannot be made so as to defeat the rights of the Crown to an escheat, see *Bartlett v. Bartlett*, cited in *Ince's Trustee Acts* (2nd ed.), p. 91.



By section 8 of the "Trustee Extension Act" the Court has power to appoint new trustees in lieu of persons convicted of felony.

47. And be it enacted, that nothing contained in this Act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed.

See Imperial Stat. 4 & 5 Wm. IV., c. 23, s. 5; and see *ante*, section 1, note.

48. And be it enacted, that where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privy of the Accountant-General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

49. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the Court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: Provided always, that no such decree shall bind,



affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid.

In *Westhead v. Sale*, 6 W. R. 52, the Court directed the Clerk of Records and Writs to certify that the cause was ready for hearing in the absence of a trustee who could not be found.

[50. Relates to the practice under the obsolete sections 38 and 39.]

51. And be it enacted, that the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of, or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper.

Where a bill was filed for the appointment of a new trustee in a case where a petition might have been presented, the plaintiff was held liable for the additional costs, *Thomas v. Walker*, 18 Beav. 521; the costs of application in the matter of a trust occasioned by the lunacy, *re Fulham*, 15 Jur. 69; *re Bury*, *ex parte Cant*, 10 Ves. 554; or bankruptcy, *ex parte Painter* 2 Dea. & C. 384; of a trustee must be borne by the *c. q. t.*; or the trust estate, according as the application is for the benefit of the *c. q. t.* solely, or generally for the benefit of the estate, see *Carter v. Sebright*, 26 Beav. 374; *re Brackenbury*, L. R. 10 Eq. 45; in *ex parte Davies*, 16 Jur. 882, the new trustee was, by consent, ordered to pay the costs, and the same, with interest, were charged on the trust estate. Where new trustees of two funds are appointed the costs will be charged ratably, *re Grant*, 2 J. & H. 764. A trustee who is served and appears on an application to appoint new trustees, in the absence of misconduct, is entitled to costs, *ex parte Harris*, 11 L. J. By. 16; *Turner v. Mollineux*, 3 L. T. N. S. 687. The costs of an application for a vesting order, caused by the death of a vendor intestate leaving an infant heir, must be borne by vendor's estate, *Heard v. Cuthbert*, 2 Ir. Ch. R. 369; *Bradley v. Munton*, 16 Beav. 294; *Ayles v. Cox*, 17 Beav. 584; and see *re South Wales Railway Company*, 14 Beav. 418; and see *Commander v. Gilrie*, 6 Gr. 473. The costs of an application for a vesting order by a mortgagor paying off the debt, occasioned by the mortgagee having died leaving an heir who could not be found, or who is lunatic, must be paid by the mortgagor, *re Lewes*, 1 Mac. & G. 23; *re Marrow*, Cr. & Ph. 142; *ex parte Ommaney*, 10 Sim. 298; *King v. Smith*, 6 Ha. 473; *re Jones*, 2 D. F. & J. 554; *re Stuart*, 4 D. & J. 317; if the application be occasioned by the mortgagee himself becoming lunatic, the application should be made by his committee, and the costs will be payable out of the lunatic's estate, *re Rowley*, 1 N. R. 251; *re Viall*, 8 D. M. & G. 439; *re Wheeler*, 1 D. M. & G. 434; *ex parte Richards*, 1 J. & W. 264; *re Townsend*, 2 Ph. 348; *re Thomas*, 22 L. J. C. 858; *re Jones*, L. R. 2 Ch. D. 70; the mortgagor is not entitled to costs, *re Phillips*, L. R. 4 Ch. App. 629; but if it appear on the face of the mortgage that a lunatic mortgagee is a mere trustee, the costs will be payable out of the trust estate, *re Jones*, 34 L. T. N. S. 470; *re Lewes*, 1 Mac. & G. 23; *re Townsend*, *ib.* 686; and if the mortgagor make the application in a case where the committee had not declined to act he will be ordered to pay the costs, *re Wheeler*, 1 D. M. & G. 434.

whom the  
upon him as  
for or in  
person shall  
own use or

of Records and  
of a trustee

sections 38

er, intrusted  
er the costs  
s, directions,  
e in pursu-  
aised out of,  
or produce  
bly shall be  
lor or Court

a case where a  
the additional  
the matter of a  
e *parte* Cant. 10  
a trustee must  
cation is for the  
te, see *Carter v.*  
*arte* Davies, 16  
, and the same,  
es of two funds  
764. A trustee  
in the absence  
16; *Turner v.*  
vesting order,  
ust be borne by  
bunton, 16 Beav.  
y Company, 14  
an application  
by the mortga-  
a lunatic, must  
Cr. & Ph. 142;  
es, 2 D. F. & J.  
the mortgagee  
committee, and  
N. R. 251; *re*  
Richards, 1 J.  
*re* Jones, L. R.  
R. 4 Ch. App.  
gagee is a mere  
L. T. N. S. 470;  
agor make the  
will be ordered

It was held in *re Primrose*, 23 Beav. 590, that the Court cannot order a respondent to pay costs of a vesting order occasioned by his own misconduct; but see the remarks on that case in *re Woodburn*, 1 D. & J. 351; costs occasioned by trustees improperly refusing to retire may be ordered to be paid by them, *Legg v. Mackrell*, 2 D. F. & J. 551; *Att. Gen. v. Murdock*, 2 K. & J. 571; *Grierson v. Astle*, 3 L. T. N. S., 288; *King v. King*, 1 D. & J. 663; *Palairt v. Carew*, 32 Beav. 564; *re Wiseman*, 18 W. R. 574. Where a petition to appoint new trustee was presented on insufficient grounds the petitioner was refused his costs, *Richardson v. Grubb*, 16 W. R., 176; a trustee appearing on the petition to appoint new trustees and disclaiming at the bar will only be allowed his costs between party and party, *Bulkley v. Earl of Eglinton*, 1 Jur. N. S. 994; and see *Norway v. Norway*, 2 M. & K. 278.

The costs of applications to appoint new trustees, as a general rule, come out of the *corpus* of the trust fund, *re Fellows*, 2 Jur. N. S. 62; *re Fulham*, 15 Jur. 69; *ex parte Davies*, 16 Jur. 882; and when new trustees are appointed of two distinct funds the costs are to be borne thereby ratably, *re Grant*, 2 J. & H. 764; but where a legacy was bequeathed to a sole trustee upon trust for a tenant for life and after his death absolutely for the revisioners, and the latter applied for the appointment of an additional trustee, the costs were ordered to be paid by the petitioners and not out of the *corpus*, *re Brackenbury*, L. R. 10 Eq. 45.

[52. Empowers the Lord Chancellor to direct a commission *De lunatico* to issue.]

See *ante* section 3, note.

53. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor, or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose.

Where a father purchased an estate in the name of his son without intending an advancement, the Court refused to declare the son who was a lunatic, a trustee for the father without a suit, and directed a suit accordingly, *Colinson v. Collinson*, 3 D. M. & G. 409; and see *re Burt*, 9 Ha. 289. Where a bank manager had taken a conveyance in his own name but on an alleged secret trust for the bank, and died without making any declaration of trust, the Court refused to declare his heir at law a trustee for the bank without suit, *re Greer, Vankoughnet C., May*, 1868.

54. And be it enacted, that the powers and authorities given by this Act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to Her Majesty (except Scotland).

Under this section a vesting order was made by the Court of Chancery in England, as to lands in Canada, *re Schofield*, 24 L. T. 322; *re Groom*, 11 L. T. N. S. 336; but it was held that lands in Ireland could not be vested by the Court in England, in a trustee appointed in the place of a lunatic trustee, *re Davies*, 3 Mac. & G. 278; but when the *c. q. t.* was in England and the surviving trustee in Ireland, the Court in England appointed a new trustee and vested the lands in him, *re Hewitt*, 6 W. R. 537.

Where in an administration suit part of the assets consisted of Government warrants for land in Manitoba, which were sold under a decree, it was held that the Court in Ontario might grant an order vesting such land warrants in a purchaser, *re*

Robertson, *Robertson v. Robertson*, 22 Gr. 449. But it seems doubtful whether the Court in Ontario could vest lands situate out of the jurisdiction of the Court, inasmuch as the Court derives all its powers from the Act of the Local Legislature which Legislature has no power itself over lands beyond its jurisdiction, and would therefore seem incapable of conferring jurisdiction over such lands upon any Court created by it.

[55. Applies Act to Ireland.]

[56. Powers of Lord Chancellor in lunacy extended to property in colonies.]

See *ante*, section 3, note.

[57. Extends power conferred on Lord Chancellor to Lord Chancellor of Ireland.]

58. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression, the "Trustee Act, 1850."

59. And be it enacted, that this Act shall come into operation on the first day of November, 1850.

An Act to extend the provisions of the "Trustee Act, 1850."

(Imperial Statute, 15 & 16 Vict., Cap. 55.)

[30th June, 1852.]

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850; Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same:

1. That when any decree or order shall have been made by any Court of Equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby or being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

See *ante* section 29 of Trustee Act of 1880, which applied only to decrees for sale for payment of debt. This section extends to orders, and to sales under decrees or orders for any purpose whatever. This section applies to cases where the decree was made before the passing of the Act, *Wake v. Wake*, 17 Jur. 545. The decree or order binds only the parties to the suit, where therefore the person having the legal estate is not before the Court no order can be made affecting it, *Gunson v. Simpson*, L. R. 5 Eq. 332; and see *Gough v. Bage*, W. N. (1871) p. 237. As to vesting orders, see R. S. O., c. 40, s. 101.

The Court of Chancery has jurisdiction even where the party seised or possessed is of unsound mind, but not found lunatic, *Herring v. Clark*, L. R. 4 Ch. App. 167.

2. That sections numbered 17 and 18 in the Queen's Printer's Copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be solely or jointly seised or possessed of any lands, or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate.

A married woman is capable of refusing, *Rowley v. Adams*, 14 Beav. 130.

A divorced woman may obtain a vesting order against her late husband, *Knight v. Knight*, W. N. (1866) 114, 14 L. T. N. S. 161; and see *re O'Donnell*, 19 W. R. 522.

Service of notice on the refusing trustee, who could not be found, was dispensed with, *re Crowe*, L. R. 13 Eq. 26.

3. That when any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof, and when any infant shall be entitled, jointly with any person or persons to any stock upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint.

Where the infant is beneficially entitled, it was held an order made under this Act declaring him trustee, was erroneous, and the order was afterwards corrected and made under 1 Wm. IV., c. 65, sec. 32, *re Westwood*, 6 W. R. 61, 316; and see *re Pongerard*, 1 D. & S. 428; see, however, *Sanders v. Homer*, 25 Beav. 467. Where a legacy was bequeathed to an infant subject to a trust for his maintenance and education and to be invested in consols and paid to him at twenty-one, and the executor invested the fund in the joint name of himself and the infant, and the executor died leaving the infant surviving, it was held that the infant was a trustee within Section 2 of Trustee Act, 1850, *Gardner v. Cowles*, L. R. 3 Ch. D. 304; and see *Rives v. Rives*, W. N. (1866) 144.

4. That where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or

to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the Court may appoint.

5. When any stock shall be standing in the sole name of a deceased person and his personal representative shall refuse or neglect to transfer such stock, or receive the dividends or income thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

6. When any order being or purporting to be under this Act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Notwithstanding the terms of this section, the Court has, at the instance of the Bank of England, reconsidered the propriety of an order made *ex parte* under the Act, *Gardner v. Cowles*, L. R. 3 Ch. D. 304; and in *re Stewart*, 8 W. R. 425; the Bank successfully appealed against an order directing the transfer of a fractional part of a dividend.

7. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the



Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto ; and it shall not be necessary for the Bank of England, or such company or association, or person to inquire concerning the propriety of such order, or whether the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery had jurisdiction to make the same.

8. That when any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person so to be appointed trustee ; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same.

9. That in all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or not at the time of making such order.

[10. Enables Lord Chancellor when acting in lunacy to exercise jurisdiction conferred on the Court of Chancery.]

[11. Enables Judges having jurisdiction in lunacy to exercise powers conferred by the Act on the Lord Chancellor.]

12. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last mentioned Act, (except so far as the same are altered by or inconsistent with this Act), shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

[13. Relates to the stamp duties payable under the Acts.]



# An Act respecting Trustees and Executors and the Administration of Estates.

(R. S. O. Cap. CVII.)

## SUMMARY APPLICATION TO CHANCERY FOR ADVICE.

**35.** Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the Court of Chancery, or by summons upon a written statement to any such Judge in Chambers, for the opinion, advice or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate.

2. Such petition or statement shall be accompanied by a certificate of counsel, to the effect that in his judgment the case stated is a proper one for the opinion, advice or direction of the Judge under this Act, and such application shall be served upon, or the hearing thereof shall be attended by all persons interested in such application, or such of them as the said Judge thinks expedient.

3. The costs of such application shall be in the discretion of the Judge to whom the application is made.

4. The trustee, executor or administrator, acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject matter of the said application; but this provision shall not extend to indemnify any trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction, 29 V., c. 28, s. 31.

The application should be by petition, *re* Dennis, 5 Jur. N. S. 1388; for form of petition, see *re* Pett's Will, 27 Beav. 576; *re* Miles, 27 Beav. 579. An order

may be made on the petition of a *cestui que trust*, *re Ward*, 14 W. R. 96; and of one trustee without the concurrence of his co-trustee, *re Muggeridge*, Johns. 625.

It is not necessary to serve all parties interested, unless there is a deficiency of assets, *re Mockett*, Johns. 628. It was at one time held that the direction of the Judge as to the parties to be served, should be obtained in the first instance, but this practice has since been disapproved of, *re Green* 8 W. R. 403.

The Act was not intended to decide nice questions of law, but to procure for trustees, at a small expense, the assistance of the Court upon points of minor importance arising in the management of the trust, *re Caldwell*, 2 Ch. Ch. R. 150; *re Spiller*, 2 L. T. N. S. 71; so advice has been given as to investment, *re Lorenz*, 1 Dr. & Sm. 401; on payment of debts, *re Box*, 1 H. & M. 552. But the Court will not on such a petition decide questions of detail where affidavits are required, *re Harrington*, 1 J. & H. 142; nor questions of difficulty, *re Simson*, 1 J. & H. 89; and see *Marsh v. Att-General*, 2 J. & H. 61; nor pronounce an opinion on a hypothetical case, *re Box*, 1 H. & M. 552.

Where questions of construction arise, a suit must be instituted, *re Evans*, 30 Beav. 232; *re Lorenz*, 1 Dr. & Sm. 401; *re Hooper*, 29 Beav. 656; and see *re Williams*, 1 Ch. Ch. R. 372.

These cases seem to overrule cases where questions of validity or construction have been determined, *re Michell*, 28 Beav. 39; *re Green*, 8 W. R. 403; *re Davies*, 9 W. R. 134; *re Elmore*, 6 Jur. N. S. 1325; *re Jacob*, 29 Beav. 402; but see *re Peyton's settlement*, 10 W. R. 515.

As a general rule, the costs of an application will be ordered to be paid out of the *corpus* of the trust property, *re McVeagh*, Seton (4th ed.) 49; but where the question was as to the application of income, the costs were given out of the income, *Anon.*, 8 W. R. 333.

#### ALLOWANCE TO TRUSTEES.

**36.** In the four following sections the term "trustee" shall include any trustee under a deed, settlement or will, and executors and administrators, and any guardian appointed by any Court, and a testamentary guardian or any other trustee, howsoever the trust is created. 37 V., c. 9, s. 1.

Before the passing of the O. S., 37 Vic., c. 9, the old rule that trustees could not receive compensation was abrogated by the Surrogate Act only as regards trustees under wills, *Wilson v. Proudfoot*, 15 Gr. 103.

**37.** A trustee shall be entitled to such fair and reasonable allowance for his care, pains and trouble and his time expended in and about the trust estate, as may be allowed by the Court of Chancery, or any Judge or Master thereof to whom the same may be referred. 37 V., c. 9, s. 2.

Under the provisions of the Surrogate Act, 22 Vic. c. 93. s. 47, compensation could for the first time be given to an executor or administrator, "for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate." And the rule of the Court was to allow compensation to trustees under a will as well as to executors, *Bald v. Thompson*, 17 Gr. 154; and compensation is allowed to all persons discharging the functions of a trustee, *re The Commissioners of the Cobourg Town Trust*, 22 Gr. 377.

The rate of compensation should depend upon the amount passing through their hands, and the time and labour spent by them. A commission of five per cent. on all moneys received and paid over or properly expended, and half that amount on the moneys received but not yet paid over, was allowed, *McLennan v. Heward*, 9 Gr. 279; but in *Thompson v. Freeman*, 15 Gr. 384, where the same allowance had been made by the Master, an appeal, on the ground of excess, was allowed, and the

executors were given—for services rendered in the case of small sums up to \$600, five per cent., and for sums above that amount, three per cent. Four per cent. on all transfers of stock and all moneys paid in and collected, held, not unreasonable, *Torrance v. Chewett*, 12 Gr. 407; and where the estate was large, requiring great care and judgment in its management for a number of years, the Court sustained an allowance of \$1,500 to the principal executor and trustee, and \$1,500 to the others jointly, *Denison v. Denison*, 17 Gr. 306. Trustees, on assuming the trust estate, are not to be allowed a commission for merely taking the same over; but trustees properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission for the receipt and proper application of the estate, payable out of the *corpus*. Trustees are not entitled to commission for the investment or re-investment of the funds of the estate. They are entitled to commission on the receipt and payment of the income, payable out of the income, and to a compensation for looking after the estate, payable out of the *corpus*, *re Berkley's Trusts*, 8 Pr. R. 193.

Executors have been held entitled to compensation for services rendered before the passing of the Act, 22 Vic. c. 93, *McMillan v. McMillan*, 21 Gr. 369.

In no case will an executor be entitled to an allowance for services performed by an agent, and which were so performed by him gratuitously, *Chisholm v. Barnard*, 10 Gr. 479. Where an executor had retained money in his hands unemployed, for which on passing his accounts he was charged with interest and rests, he was, notwithstanding, allowed commission, *Gould v. Burritt*, 11 Gr. 523; but commission should not in general be allowed in respect of sums which an executor did not receive, but with which he is charged on the ground of wilful neglect and default, *Bald v. Thompson*, 17 Gr. 154. An administrator is not entitled to an allowance upon rents received by him, for as to them he is an intermeddler, *Dagg v. Dagg*, 25 Gr. 542.

The rule in equity, which requires that the expenses incurred by a trustee in the execution of his office shall be satisfied before the *cestui que trust* can compel a conveyance of the trust estate, applies to the commission or allowance to a trustee for his care, pains, and trouble, *Life Association of Scotland v. Walker*, 24 Gr. 293; and see *Harrison v. Patterson*, 11 Gr. 105. A trustee is entitled to retain his commission from time to time out of moneys received, without waiting for the completion of his trust duties, *Heron v. Moffat*, 7 Pr. R. 438. Where a legacy is given to executors as compensation they are at liberty to claim a further sum under the Statute if it is not sufficient, *Denison v. Denison*, 17 Gr. 306; such a legacy does not, on a deficiency of assets, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand, *Anderson v. Dougall*, 15 Gr. 405; but in *Kennedy v. Pingle*, 27 Gr. 306, executors were held not entitled to such a legacy and also commission; and see *Freeman v. Fairlie*, 3 Mer. 24.

**38.** A Judge of the Court of Chancery may, on application to him for the purpose, settle the amount of such compensation, although the trust estate is not before the Court in any suit. 39 V. c. 9, s. 3.

**39.** Nothing in the three preceding sections shall apply to any case in which the rate of allowance is fixed by the instrument creating the trust. 37 V. c. 9, s. 4.

Where the compensation to a trustee is fixed by the deed, the Master cannot reduce the amount, *Heron v. Moffat*, 7 Pr. R. 438.

**40.** The four next preceding sections shall apply to any trust heretofore created, as well as any to be hereafter created. 37 V. c. 9, s. 5.

## ALLOWANCE TO EXECUTORS.

41. The Judge of any Surrogate Court may allow to the executor or trustee or administrator acting under will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and therefor may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts. C. S. U. C. c. 16, s. 66.

Where a suit for the administration of an estate is pending, it is improper for the Surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors, *Cameron v. Bethune*, 15 Gr. 486; and the Court will not refer it to the Surrogate Judge to settle the compensation to be allowed, but will finally dispose of the rights of all parties, *McLennan v. Heward*, 9 Gr. 279. Where an executor, pending an account before the Master, obtained from the Surrogate Judge an order fixing his compensation, which the Master acted upon without exercising his own judgment, an appeal from the report of the Master by creditors was allowed, and the executor ordered to pay the costs, *Biggar v. Dickson*, 15 Gr. 233.

y allow to the  
r will or letters  
ce for his care,  
about the exe-  
estate and ef-  
administration,  
ng and settling  
ing the affairs  
or orders from  
to an executor,  
C. S. U. C. c.

## GENERAL ORDERS

OF THE

## COURT OF CHANCERY,

WHICH REMAIN IN FORCE NOTWITHSTANDING THE PASSAGE OF

## THE JUDICATURE ACT.

g, it is improper for  
of a commission to  
the Court will not  
be allowed, but will  
1, 9 Gr. 279. Where  
from the Surrogate  
acted upon without  
Master by creditors  
Aggar v. Dickson, 15

## MASTER'S OFFICE.

**211.** Every order referring any matter to the Master is to be brought into his office within fourteen days after the order is drawn up, or after the same should have been drawn up, by the party having the carriage of the same; otherwise any other party to the cause, or any party having an interest in the reference, may assume the carriage of the order, and carry the same into the Master's office. (3rd June, 1853; Order 42, s. 1.)

Under Ord. 42, s. 1, of 3rd June, 1853, the party having the carriage of the decree was required to carry it into the Master's office within fourteen days after the decree was pronounced, otherwise any other party might apply to the Court for the carriage of the reference. The time for carrying in a decree has been extended, as it is sometimes impossible to have the decree in a cause heard on circuit, drawn up and entered within fourteen days. The latter part of the order which enables any party to the cause, or any party interested in the reference, to assume the carriage of the decree without applying to the Court, where the plaintiff is delaying, will it is hoped lead to greater promptness in carrying in decrees.

Where a decree has been carried into the Master's office, Order 212 provides, that, if the party prosecuting the decree does not proceed with due diligence, the Master may give the conduct of the reference to any other person interested.

**212.** Where a party prosecuting a reference, does not proceed before the Master with due diligence, the Master is at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the Master under the order, to commit to him the prosecution of the order; and from thenceforth neither the party making default nor his solicitor is to

be at liberty to attend the Master as the prosecutor of the order. (3rd June, 1853; Ord. 42, s. 10.

This Order is a copy of English Order 56, of April, 1828.

See Order 584 under which, where there is delay in prosecuting a reference in the Master's office he may issue his warrant to the solicitors or parties interested, calling upon them to shew cause why the reference should not be duly proceeded with. In default of sufficient cause being shewn to excuse the delay, or upon default in attending upon the return of the warrant, it is the duty of the Master to certify to the Court the circumstances of the case, and thereupon the reference in his office is to be deemed closed, and is not to be resumed until further order.

Previous to that order, the practice of the Court was, especially in creditor's suits, in case the party whose duty it was to prosecute a decree neglected his duty, to allow a party interested as a creditor to obtain an order to prosecute in his stead, *Creuze v. Hunter*, 2 Ves. 157; *Sims v. Ridge*, 3 Mer. 458; *Powell v. Walworth*, 2 Mad. 183; *Edmunds v. Acland*, 5 Mad. 31; *Cook v. Bolton*, 5 Russ. 282; and the Court may still exercise its authority by taking the prosecution of a decree from the plaintiff and entrusting it to another, and that even after the Master has exercised his judgment upon it, and has refused the application, *Wyatt v. Sadler*, 5 Sim 450.

This Order applies only to proceedings in the Master's office, therefore a plaintiff from whom the Master has taken the conduct of the suit, is not thereby precluded from afterwards making an application to the Court in the suit, *Whitehead v. North*, Cr. & Ph. 78.

As to the right of the party substituted under this Order, to inspect and take copies of the briefs, documents, etc., in the possession of the party from whom the carriage of the decree has been taken, see *Bennett v. Baxter*, 10 Sim. 417.

It is not irregular for the Master to act under this Order on the *ex parte* application of the defendant, *Stevenson v. Nicol*, 14 Gr. 144.

An application to compel the party having the carriage of an order made on an appeal from a Master's report to proceed with the inquiry in the Master's office, should be made to the Master who has possession of the case, and not in Chambers, *Miller v. MacNaughten*, 1 Ch. Ch. R. 206.

**213.** Every reference is to be called on and proceeded with at the day and time fixed, unless the Master in his discretion thinks fit to postpone the same; and in granting an application to postpone the hearing of a reference, the Master may make such order, as to the costs consequent upon such postponement, as he thinks just. (3rd June, 1853; Ord. 42, s. 3.)

**214.** As soon as the Master has entered upon the hearing of a reference, he is to proceed therewith to the conclusion without interruption, where that is practicable; and where any reference cannot be concluded in a single day, the Master is to proceed *de die in diem*, without a fresh warrant, unless he is of opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of justice; and when an adjournment is ordered, the Master is to note in his book the time and reason thereof. (3rd June, 1853; Ord. 42, s. 8.)

In *Falls v. Powell*, 20 Gr. 468, Spragge, C., said:—"I have referred to the General Orders of this Court, enabling parties to proceed continuously in the

Master's office, and making it the duty of the Masters of the Court so to proceed. The observations that I have made as to the fitness of this Court to take accounts between parties, and of its superior fitness in cases of a like nature to this, as compared with a Court of law, lose much of their force, if the General Orders in relation to the Master's office are not observed. I apprehend that the rules laid down are too often deviated from upon insufficient grounds, to the great delay of the business of the Court, and I speak the sentiments of my learned brothers, as well as my own, when I say that it is the bounden duty of the Masters to observe these Orders to the letter, whenever it is not impracticable to follow them literally."

**215.** In no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, unless that course becomes necessary. (3rd June, 1853; Ord. 42, s. 8.)

**216.** Upon the bringing in of an order, the solicitor bringing in the same is to take out a warrant (unless the Master dispenses therewith) appointing a time, which is to be settled by the Master, for the purpose of taking into consideration the matters referred by the order, and is to serve the same upon the parties, or their solicitors, unless the Master dispenses therewith. (3rd June, 1853; Ord. 42, s. 2.)

**217.** Upon the return of the warrant to consider, or upon the bringing in of the reference where the warrant is dispensed with, the Master is to fix a time at which to proceed to the hearing and determining of the reference, and is to regulate in all other respects the manner of proceeding with the reference, and is to give any special directions he thinks fit, as to:—(1) The parties who are to attend on the several accounts and inquiries; (2) The time at which, or within which, each proceeding is to be taken; (3) The mode in which any accounts referred to him are to be taken or vouched; (4) The evidence to be adduced in support thereof; (5) The manner in which each of the accounts and inquiries is to be prosecuted; and such directions may be afterwards varied or added to, as may be found necessary. (3rd June, 1853; Ord. 42, s. 2.)

This Order does not wholly exclude the jurisdiction of the Court in regulating what parties are to attend before the Master. The Master having excluded trustees of a fund from attending before him on a question of investment, the Court gave them leave to attend, *Davis v. Combermere*, 9 Jur. 76. It applies as well to a reference upon motion, as to a decree, *Woodroffe v. Titterton*, 8 Sim. 238.

Parties are at liberty, on an inquiry in the Master's office, to use all proceedings which are of record in the cause, whether pleadings, or in the nature of evidence as depositions of witnesses or affidavits, *Daniell's Pr. (Perk. ed.)* p. 1188. The right to use the proceedings in the cause as evidence on a reference is subject to the same rules and restrictions as govern the admissibility of evidence before the Court, *Id.* p. 1189; and see *Court v. Holland, ex parte Holland & Walsh*, 8 Pr. R. 219. The Eng. Ord. 65 of 3rd April, 1828, provided: "That all affidavits which have been previously made and read in Court upon any proceeding in a cause or matter may be read before the Master."



In taking accounts under an ordinary decree settled accounts are never disturbed unless specially directed so to be, *Newen v. Wetten*, 31 Beav. 315.

A party may appeal from a Master's ruling, and need not wait until a report is made, *McDonald v. Wright*, 12 Gr. 552; such an appeal should be taken within the same time as is allowed for an appeal from a report, *Mitchell v. Mitchell*, 22 Gr. 26.

**218.** Where, at any time during the prosecution of a reference, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor; and where the parties, constituting such class, cannot agree upon the solicitor to represent them, the Master may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties constituting such class, insists on being represented by a different solicitor, such party is personally to pay the costs of his own solicitor, of, and relating to, the proceedings before the Master, with respect to which such nomination has been made, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated. (20th Dec., 1865; Ord. 35.)

A solicitor so appointed is authorized not only to act for such creditors in the Master's office, but also in proceedings arising out of or connected with them, such as a motion in Court on behalf of the creditors, *re McConnell*, 3 Ch. Ch. R. 423.

**219.** To enable the Master to exercise all or any of the powers conferred upon him by, or to take the accounts and make the inquiries referred to, in the following Orders, it shall not be necessary that any of the matters therein mentioned shall have been stated in the pleadings, or that evidence thereof shall have been given before the order of reference, or that the order shall contain any specific direction in respect thereof.

The Master has no power to relax any of the General Orders of the Court. *Smith v. Webster*, 3 M. & C. 244; *Lloyd v. Wait*, 4 M. & C. 257; *Bertolacci v. Johnson*, 2 Hare, 632.

**220.** Under an order of reference, the Master shall have power:—(1) To take the accounts with rests or otherwise; (2) To take account of rents and profits received, or which, but for wilful neglect or default, might have been received; (3) To set occupation rent; (4) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so; (5) To make all just allowances; (6) To report special circumstances; (7) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred. (3rd June, 1853; Ord. 42, s. 18.)

This section confers upon the Master much larger powers, in many respects, than even a Judge in Chambers in England possesses. It has no English original, and is confined to the practice of our own Court. Order 142 of April, 1843, is the foundation upon which it rests, but altered by the removal of certain restrictions. That order provided that the accounts to be taken by the Master, should be taken according to the laws and practice of the Court of Chancery. This limitation in strictness of language was perhaps unnecessary, as all accounts must have been, and must be taken in that manner, but it was not an unmeaning safeguard and was a plain intimation to the Master of his duty, and the mode of pursuing it. And there was a proviso that claims for improvements should not be entertained unless a case was made upon the pleadings for them.

Upon all the matters of account mentioned in this section, a case must be made before the Master, such as, under the former practice, required to be made upon the pleadings, to authorize the Court to make a decree upon them.

As to taking an account with rests, see *Coldwell v. Hall*, 9 Gr. 110; *re Armstrong*, *Inglis v. Beaty*, 2 App. R. 453.

As to taking evidence and reporting facts as to advances for infants, and as to allowing for their maintenance under the common administration order, see *Stewart v. Fletcher*, 17 Gr. 235; *Feilder v. O'Hara*, 2 Ch. Ch. R. 255.

**221.** Under an order of reference, witnesses may be examined before any examiner of the Court; and foreign commissions for the examination of witnesses without the jurisdiction of the Court, may, on the certificate of the Master, be issued by the Clerk of Records and Writs upon præcipe. (3rd June, 1853; Ord. 42, s. 14.)

A Master has jurisdiction to direct evidence to be used on an inquiry before him, to be taken before any other Master, though not consented to, *re Casey*, 1 Ch. Ch. R. 198; a certificate for a foreign commission cannot be granted *ex parte*, *McLennan v. Helps*, 3 Ch. Ch. R. 193.

**222.** The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he deems expedient. (3rd June, 1853; Ord. 42, s. 14.)

An order to produce documents involves an order to leave them, if the Master thinks fit so to direct, *Sidden v. Liddiard*, 1 Sim. 388; *Shirley v. Earl Ferrers*, 1 M. & C. 304.

The Court leaves it to the Master to decide whether the documents are to be produced from time to time, or to be deposited, *Henna v. Dunn*, 6 Mad. 340.

As to the Master's certificate of default, see *Harris v. DeTastet*, 1 S. & S. 263; *Askew v. Peddle*, 10 Sim. 182.

As to form of certificate, see *Sutherland v. Rogers*, 2 Ch. Ch. R. 191; *Bennett's Mas. Off. app.* 30.

Where the Master directed the production of all books, etc., connected with one of the subjects of the reference, and none of them being produced, a four day order obtained upon a certificate that the parties had been duly summoned to produce all books, etc., relating to the matters in question in this suit, was discharged, *Stubbs v. Molineux*, 4 Beav. 545.

After decree, a defendant can compel production by a co-defendant, *Hart v. Montefiore*, 10 W. R. 97.

**223.** The Master may cause advertisements for creditors; and if he thinks it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require; and in such advertisements he is to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the decree. (3rd June, 1853; Ord. 42, s. 14.)

As to advertisements in administration suits, see Ord. 475. Where an executor has advertised for creditors under R. S. O. c. 107, s. 34, no further advertisement need be issued in an administration suit, *Cuthbert v. Wharmby*, Seton, (4th ed.) 805, 829; W. N. (1869) p. 12.

**224.** The Master is to proceed on the claims brought in before him pursuant to such advertisement, without further notice, and may examine witnesses in relation thereto at the time appointed in the advertisement, or thereafter, as he sees fit; and he is to allow or disallow or adjourn the claims as to him seems just. (3rd June, 1853; Ord. 42, s. 11.)

As to the mode of proceeding upon claims in administration suits, see Ord. 467 *et seq.*

In a creditor's suit the plaintiff must prove his claim in the Master's office, and each creditor may dispute the claims of the others, *Field v. Titmus*, 1 Sim. N. S. 218; *Owens v. Dickenson*, Cr. & Ph. 48.

Where under a common administration order a creditor applies to prove a debt barred by lapse of time, if the executor does not take the objection, any other party interested may do so, *Shewen v. Vanderhorst*, 1 R. & M. 347; on app. 2 R. & M. 75; *Moodie v. Bannister*, 4 Drew. 432; *Fuller v. Redman* (2), 26 Beav. 614; *Jardine v. Wood*, 19 Gr. 618. An executor may retain his own debt, though barred by the statute, *Crooks v. Crooks*, 4 Gr. 615; and see *Sander v. Heathfield*, L. R. 19 Eq. 21; even in the lifetime of the testator, *Hill v. Walker*, 4 K. & J. 166. An executor *de son tort* cannot retain for his own debt, or give that in evidence under *plene administravit*, Wms. on Ex'ors. (8th ed.), 273, 1051; but if even *pendente lite* he obtain administration he may, *Ibid.* 273. The right of retainer is not lost by a decree being made for administration. It may be asserted at any time before the assets are distributed, *Stahlschmidt v. Lett*, 1 Sm. & G. 415. In *Coombs v. Coombs*, L. R. 1 P. & D. 288, the Court gave administration to a creditor whose debt was barred by statute, inserting in the bond a clause that he would distribute the estate ratably.

Although the time had elapsed, creditors were allowed to come in so long as the fund was in Court, *Lashley v. Hogg*, 11 Ves. 602; after deficient assets apportioned among creditors, and transferred to the accountant-general for payment to them, another creditor allowed to come in on payment of consequent costs, *Angell v. Haddon*, 1 Madd. 529.

A creditor coming in after long delay every defence against his claim allowed as on a new bill, and undistributed part of the assets liable only proportionally, *Greig v. Somerville*, 1 R. & M. 338; creditor coming in after some legatees paid, and fund carried to account of the rest, entitled to a proportional part only of the latter, *G'aspie v. Alexander*, 3 Russ. 130.

Claim disallowed by chief clerk in one suit, is not barred in another, *Teed v. Beere*, 5 Jur. N. S. 381; 7 W. R. 394.

A claimant in an administration suit, may be cross-examined upon his affidavit in support of his claim, *Cast v. Poyser*, 3 Jur. N. S. 38; 26 L. J. Ch. 353.

In an administration suit a creditor brought in a claim for a large amount, against which the administratrix alleged there was a set off. The claim and set off having been fully gone into, the Master found that the creditor was really a large debtor to the estate, and so reported. On the hearing on further directions the claimant was ordered to pay into Court, to the credit of the cause, the amount which had been found due by the Master, *re Liloyd, Ogilvy v. Liloyd*, V. C. Blake, Mar. 1881.

**225.** The costs of proving such claims are, in the discretion of the Master, to be allowed to the creditors proving the same, and added to their debts respectively, or to be disallowed. And in case of their being allowed, they may be allowed in gross in place of taxed costs. (3rd June, 1853; Ord. 42, s. 11.)

A creditor is entitled to the costs of establishing his debt; and the Court has jurisdiction to order payment of costs, by a creditor failing to prove his claim, *Hatch v. Searles*, 2 Sm. & G. 147; 2 W. R. 297; *Yeoman v. Haynes*, 24 Beav. 127; *Colyer v. Colyer*, 10 W. R. 748.

The power given to the Master to allow a gross sum in lieu of taxed costs, does not affect the costs of the creditor who is plaintiff in the suit, *Flinthoff v. Haynes*, 4 Hare, 309.

Where the fund is insufficient the costs are added to the debts and with them apportioned, *Morshead v. Reynolds*, 21 Beav. 638.

**226.** Under every order whereby the delivery of deeds or execution of conveyances is directed, the Master is to give directions as to the delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties to the conveyances, and as to the execution thereof. (3rd June, 1853; Ord. 42, s. 14.)

In a suit for specific performance, (*Cartwright v. Ross*, 8th April, 1873,) where a question arose as to the subsequent costs of preparing and settling a lease, V. C. Strong said:—"I have considered the question, and the result is as follows: The conveyance is always prepared by the purchaser at his own expense, unless there is a stipulation to the contrary, and there is none here; the vendor has, however, to bear the expense of execution and perusal. The usual decree in specific performance suits is that the conveyance be settled by the Master in case the parties differ, and no distinction is made in the decree in such cases between the costs of settling conveyance and the other costs, where the costs are given. I take it, therefore, to be the practice that, as a general rule, in all such cases the Master taxes the costs having regard to the practice in conveyancing to which I have adverted, requiring the purchaser to prepare the conveyance, and the vendor to execute it, each at his own expense, and that the decree does not make any special disposition of these costs."

Where, in consequence of some of the parties being infants, a conveyance which might otherwise have been settled between the parties, was necessarily referred to a Master, the costs of such reference, were ordered to be borne by the infants' estate, *Rodgers v. Rodgers*, 2 Ch. Ch. R. 241; *Brown v. Lake*, 15 L. J. Ch. 34.

Under number 5 of the standing conditions of sale of the Court of Chancery, a purchaser, where the sale is on credit, must prepare the mortgage at his own expense, *Fahner v. Ran*, 1 Ch. Ch. R. 246; and must pay the fees for its registration, *Sweetnam v. Sweetnam*, 6 Pr. R. 83. The purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor to procure its execution by all necessary parties, *Weiss v. Crofts*, 6 Pr. R. 151.

**227.** Where any account is to be taken, the accounting party is, unless the Master otherwise directs, to bring in the same in the form of debtor and creditor, verified by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto. (3rd June, 1853; Ord. 42, s. 6.)

Where accounts are brought in in an improper form, a party who has acquiesced therein cannot afterwards set them aside, *Weale v. Rice*, C. P. Cooper, 438.

**228.** The Master, if he thinks fit, may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised. (3rd June, 1853; Ord. 42, s. 2.)

This section applies only where the vouchers have been lost and the accounts cannot be taken in the ordinary way; such directions will not be given merely to save expense, nor when ordinary evidence can be had, *Lodge v. Pritchard*, 3 D. M. & G. 906. The books of a partnership are *prima facie* evidence against each partner, and, therefore also for any of them against the others, *Lindley, Lodge v. Pritchard, supra*.

Accounts taken in a suit in Jamaica ordered to be taken as *prima facie* evidence, *Sleight v. Lawson*, 3 K. & J. 292; and see *Stainton v. Carron Co.*, 24 Reav. 346.

Where the books of a manufactory, of which the plaintiff was manager, were kept by the defendant, the Court held that the contents, though not binding on the plaintiff, might, as he had free access thereto, be taken as *prima facie* evidence against him, with liberty to him to surcharge and falsify, *Ogden v. Battams*, 1 Jur. N. S. 791; and see *Banks v. Cartwright*, 15 W. R. 417; *Hardwick v. Wright*, 15 W. R. 953.

Where a solicitor was ordered to deliver a bill of costs, an agreement for the payment of a fixed sum being set aside, V. C. Stuart refused to direct that entries made by him several years before, and contemporaneous with the transactions, should be taken as *prima facie* evidence, *Coleman v. Mellersh*, 2 Mac. & G. 309.

**229.** No states of facts, charges, or discharges, are to be brought into the Master's office; and where original deeds or documents can be brought in, no copies are to be made without special direction. (3rd June, 1853; Ord. 42, s. 5.)

**230.** Where directed copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees, and concise statements, are to be supplied; and where so directed, copies are to be delivered as the Master may direct. (3rd June, 1853; Ord. 42, s. 5.)

**231.** A party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master, without any warrant or written direction being served for that purpose. (3rd June, 1853; Ord. 42, s. 2.)

**232.** Before proceeding to the hearing and determining of a reference, the Master may appoint a day in the meantime, if he thinks fit, for the purpose of entering into the accounts and inquiries, with a view to ascertain what is admitted and what is contested between the parties. (3rd June, 1853; Ord. 42, s. 2.)

**233.** Where the Master has omitted to appoint a day for the purposes mentioned in Order 232, he may grant to the party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid; such warrant to be underwritten, as follows: "On leaving the accounts of, &c.; and take notice that you are required to admit the same, or such parts thereof as you can properly admit." (3rd June, 1853; Ord. 42, s. 3.)

**234.** Where it becomes necessary to adduce evidence, or to incur expenses otherwise, in establishing or proving items of account, or other matters which in the judgment of the Master ought, under all the circumstances, to have been admitted by the party sought to be charged therewith, and which the party has refused to admit, the Master, before making his report, is to proceed to tax such costs, occasioned by such refusal, as shall appear to him reasonable and just, and shall state in his report the amount of such costs and how the same were occasioned. (3rd June, 1853; Ord. 42, s. 3.)

**235.** The party to whom costs are payable under Order 234, is to be entitled, upon the Master's report becoming absolute to the process of the Court to compel payment thereof as in other cases. (3rd June, 1853; Ord. 42, s. 3.)

**236.** Where the party entitled to receive the general costs of the cause is the party ordered to pay costs under Order 234, he is at liberty to deduct such costs from the general costs, where the general costs and the interlocutory costs, are between the same parties. (3rd June, 1853; Ord. 42, s. 3.)

**237.** A party seeking to charge an accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating so far as he is able, the amount so sought to be charged, and the particulars thereof in a short and succinct manner. (3rd June, 1853; Ord. 42, s. 7.)

An accounting party who files an affidavit verifying his account, if he is cross-examined on such affidavit is entitled to notice of the points on which he is to be cross-examined, *re* Lord, L. R. 2 Eq. 605; *Wormaley v. Sturt*, 22 Beav. 398.



**238.** The Master is to keep in his office a book, to be called the "Master's Book," in which, upon the bringing in of an order of reference, are to be entered, the style of the cause, the name of the solicitor prosecuting the reference, the date of the order being brought in, and the proceedings then taken; and the Master is also to enter therein, from time to time, the proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference or otherwise. (3rd June, 1853; Ord. 42, s. 4.)

The Master's office is not a public court which any person may enter, but is simply a private room, see *re Western Canada Oil Lands and Works Company, Limited*, 25 W. R. 787; *Wright v. Wilkin*, 6 W. R. 643; a special examiner has power to exclude witnesses from his room during an examination, and he may exercise such power when the witness is a party to the suit; a refusal to comply and not withdrawing when ordered to do so, is a contempt of court, *Sadleir v. Smith*, 14 U. C. L. J. 30.

Upon the examination of two defendants before a Master, he, at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to withdraw, but they refused; the Master thereupon declined to proceed with the examination:—Held, that the Master should have allowed one defendant to be present on behalf of the plaintiff, if he was satisfied that this was required for the proper representation of his interest, but by analogy to R. S. O. c. 50, s. 260, he might require such defendant to be examined first, if he was to be called as a witness, *Sivewright v. Sivewright*, 8 Pr. R. 81.

**239.** Upon the application of any person, the Master is to certify, as shortly as he conveniently can, the several proceedings had in his office in any cause or matter, and the dates thereof. (3rd June, 1853; Ord. 42, s. 9.)

This Order is somewhat different in its language from the Order of 3rd June, 1853. By the latter Order the certificate could be obtained only upon application being made to the Court, and then, only by the person making the application.

Affidavits cannot be read to contradict the certificate of an officer of the Court, *Foley v. Griffith*, 2 Moll. 318; *Beavan v. Burgess*, 10 Jur. 63.

As to form of certificate of default in not bringing accounts or documents into the Master's office, see *Sutherland v. Rogers*, 2 Ch. Ch. R. 191; *Bennett's Mas. Off. app. 30*.

**240.** In giving directions, and in regulating the manner of proceeding before him, the Master is to devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and every part thereof; and with that view, to dispense with any proceedings ordinarily taken, but which he conceives to be unnecessary and to shorten the periods for taking any proceedings; or to substitute a different course of proceedings for that ordinarily taken. (3rd June, 1853; Ord. 42, s. 2.)

**241.** Where the Master directs parties not in attendance before him, to be notified to attend at some future day, or for



different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same. (29th June, 1861.)

The form of a Master's warrant is :—  
IN CHANCERY.

A v. B.

By virtue of an Order of Reference, I appoint to consider of the matters thereby to me referred, on at of the clock noon at my Chambers in and let all parties then attend. Dated, etc.

The form of a general appointment issued under this Order is as follows :—  
IN CHANCERY.

A v. B.

By virtue of an Order of Reference, I do appoint the several days and times hereunder written for the several purposes also hereunder written, at my Chambers, in at which time and place all parties concerned are to attend. Dated, etc.

**242.** Where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants are to be issued as to such parties, in relation to the same proceedings. (29th June, 1861.)

**243.** Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them. (29th June, 1861.)

**244.** Where in proceedings before the Master, it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office-copy of the decree to be served upon such parties; and upon due service thereof, such parties are to be treated and named as parties to the suit, and are to be bound by the decree in the same manner as if they had been originally made parties. (3rd June, 1853; Ord. 42, s. 15.)

This order applies only to cases in which it becomes necessary to add persons as parties in the Master's office. In proceeding upon a reference under a decree, the Master cannot under G. O. 244, 245, order a person to be made a party against whom any relief is sought; and where in proceeding under a decree for the administration of a testator's estate, the Master directed one, D., who had been in partnership with the testator up to the time of his death, to be made a party, and required him with the executors to bring in under oath an account of the partnership dealings, against which D. appealed :—Held, that the object of making D. a party was for the purpose either of relief or discovery, and in either view the plaintiff could not obtain it in this mode of proceeding, as D., so far as discovery was concerned, could only be regarded as a witness, *Hopper v. Harrison*, 28 Gr. 22.

The orders as to service on persons interested, but not necessarily parties (see *English v. English*, 12 Gr. 441, *Rodgers v. Rodgers*, 13 Gr. 457), of an office-copy of the decree so as to bind them are as follows :—

Order 58. It shall not be competent to a defendant to take an objection for want of parties in any case to which the seven rules next hereinafter set forth apply. (3rd June, 1853; Ord. 6, s. 2.)

Rule 1.—A residuary legatee, or next of kin, may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin. (Imp. Act 15 & 16 V., c. 86, s. 42, r. 1.)

Rule 2.—A legatee interested in a legacy charged upon real estate; or a person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate. (Imp. Act 15 and 16 V. c. 86, s. 42, r. 2.)

Rule 3.—A residuary devisee or heir, may have the like decree, without serving any co-residuary devisee or co-heir.

Rule 4.—One of several *cestuis que trust*, under a deed or instrument, may have a decree for the execution of the trust of the deed or instrument, without serving any other of such *cestuis que trust*. (Imp. Act 15 & 16 V., c. 86, s. 42, r. 4.)

Rule 5.—In all cases of suits for the protection of property pending litigation, and in all cases in the nature of *waste*, one person may move on behalf of himself, and of all persons having the same interest. (Imp. Act. 15 & 16 V., c. 86, s. 42, r. 5.)

Rule 6.—An executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts. (Imp. Act. 15 & 16 V., c. 86, s. 42, r. 6.)

Rule 7.—An assignee of a chose in action may institute a suit in respect thereof without making the assignor a party thereto.

Order 59. In all the above cases the Court, if it sees fit, may require any other person to be made a party to the suit, and may, if it sees fit, give the conduct of the suit to such person as it deems proper; and may make such order in any particular case as it deems just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matter in question. (3rd June, 1853; Ord. 6, s. 2.) (Imp. Act 15 & 16 V., c. 86, s. 42, r. 7.)

Order 60. In all the above cases the persons who, according to the practice of the Court, would be necessary parties to the suit are to be served with an office copy of the decree (unless the Court dispenses with such service) endorsed with the notice set forth in schedule A, hereunder written, and after such service they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary, or set aside the decree, within fourteen days from the date of such service. (3rd June, 1853; Ord. 6, s. 2.)

The schedule A is as follows:—"Take notice, that from the time of the service hereof, you (*or, as the case may be, the infant, or person of unsound mind*) will be bound by the proceedings in this cause in the same manner as if you (*or, the said infant, or person of unsound mind*) had been originally made a party to the suit: and that you (*or, the said infant, or person of unsound mind*) may, upon service of notice upon the plaintiff, attend the proceedings under the within decree; and that you (*or, the said infant, or person of unsound mind*) may, within fourteen days after the service hereof, apply to the Court to add to, vary, or set aside the said decree: A. B., of the City of Toronto, in the County of York Plaintiff's Solicitor."

This rule as to serving parties applies to infants, *Clarke v. Clarke*, 20 L. T. 88; and to parties out of the jurisdiction, *Chalmers v. Laurie*, 10 Hare, app. 27; *Maybery v. Brooking*, 7 D. M. & G. 673; *Strong v. Moore*, 22 L. J. Ch. 917.

In an administration suit by a residuary legatee, other residuary legatees, served with notice of the decree and having liberty to attend the proceedings, will not be allowed their costs of attending the taking of the accounts, unless the plaintiff and the accounting defendant employ the same solicitor, and in that case will be allowed one set of costs between them, *Daubney v. Leake*, L. R. 1 Eq. 405.

Persons who at the date of the decree had no interest in the suit cannot be brought before the Court under this order, *Colyer v. Colyer*, 11 W. R. 355.

Where a party served with an office copy of the decree feels aggrieved thereby, he should move, upon notice, for leave to present a petition in the nature of a bill of review, *Kidd v. Cheyne*, 18 Jur. 348; he may appeal against the decree, *Ellison v. Thomas*, 1 D. J. & S. 18.

As to dispensing with service, see Ord. 587.

**245.** The office copy of a decree directed to be served under Order 244, is to be endorsed with a notice to the effect set forth in schedule L to these Orders, with such variations as circumstances require. (3rd June, 1853; Ord. 42, s. 15.)

The Schedule L is as follows :

To A. B., (*the person upon whom service has been directed.*) (*Set out the order.*)

If you wish to apply to discharge the foregoing order, or to add to, vary, or set aside, the decree, you must do so within fourteen days from the service hereof. (*When the order fixes a time for the further proceedings, add.*) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken, in your absence, as may seem just and expedient; and you will be bound by the decree, and the further proceedings in the cause, in the same manner as if you had been originally been made a party to the suit, without any further notice.

**246.** A party served with an office copy of a decree under Order 244, may apply to the Court, at any time within fourteen days from the date of such service, to discharge the order, or to add to, vary, or set aside the decree. (3rd June, 1853; Ord. 34, s. 7.)

The time of vacation is not reckoned in the computation of the fourteen days, Ord. 408. The Court has jurisdiction in a proper case to entertain an application, after the expiration of the fourteen days, *Stewart v. Hunter*, 2 Ch. Ch. R. 265.

**247.** As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book and after such entry no further evidence is to be received, or proceedings had, without the special permission of the Master; and the Master may proceed to prepare his report or certificate without further warrant, except the warrant to settle, which is to be served on the parties, as the Master directs. (3rd June, 1853; Ord. 42, s. 16.)

"As to the rule laid down by the Master, that to open a case and let in new evidence, the applicant must make such a case as would entitle him to a new trial, I consider the rule to be a very good one, and hope the Master will act up to it, except in very exceptional cases," per Strong V. C. in *Waddell v. Smyth*, 3 Ch. Ch. R. 412. See 1 *Graham & Waterman* 462, *et seq.*, as to granting a new trial on the ground of newly discovered evidence.

**248.** Parties are to raise before the Master, in respect of any matter presented in his office, for his decision, all points which may afterwards be raised upon appeal; and in case an appeal is allowed on any ground not distinctly taken before the Master, the Court may order the appellant to pay the costs of the appeal. (6th Feb., 1865; Ord. 36.)

Permitting appeals without objections being previously taken, was a great injustice to the Masters of the Court as on many occasions objections were taken and argued before the Court on the appeal, which, had they been brought under the

notice of the Master, would have led him to re-consider his decision, and induced him to come to a different conclusion from that at which he did arrive. As objections are the foundation for exceptions, and the latter must strictly follow the objections, great attention is required in framing them, so that the points may be properly brought before the Court, *Ballard v. White*, 2 Hare, 138.

In England the practice was that there should be four days between the issuing of the warrant "to sign the report" and the return, to allow the opposing or other parties time to object to the draft of the report, if so advised. Where parties were dissatisfied with the Master's finding, and were advised to bring that finding more particularly before the Court, they had then four days allowed them to bring in objections to the draft of such report; and unless those objections were carried in, the Court would not afterwards allow a party to except to the report, unless under very special circumstances, *Noel v. Ward*, 1 Madd. 339; *Pennington v. Lord Muncaster*, 1 Madd. 555; *Wood v. Lambirth*, 9 Sim. 195. Where permission given to file exceptions, where no objections to the draft report brought in before the Master, the party depending upon the chance of his appeal to the Court seeking delay, though the objections are allowed, yet the party, for the neglect and occasioning trouble to the Court, shall pay such costs as the Court thinks reasonable, *Bowker v. Nickson*, 3 Madd. 439; leaving objections not mere form, but to enable the Master to reconsider his opinion, *Ibid*.

Where, from the nature of the case, the Master considers it proper to allow the party further time to prepare and bring in his objections, he does so, on his being attended by the parties on a warrant taken out for that purpose, by the party requiring time. As to objections generally, see *Ottey v. Pensam*, 1 Hare, 322.

**249.** In the Master's reports no part of an account, charge, affidavit, deposition, examination, or answer, brought in or used in the Master's office, is to be stated or recited, but, instead thereof, the same may be referred to by date or otherwise, so as to inform the Court as to the paper or document so brought in or used. (3rd June, 1853; Ord. 42, s. 12.)

The Master's report is *prima facie* evidence of what it contains, unless appealed from, *Nichols v. McDonald*, 6 Gr. 594. It should generally speaking be confined to results, unless the Master is directed by the decree to state his reasons, and then he should do so briefly, *McCargar v. McKinnon*, 15 Gr. 370.

A Master's report should bear date the day it is actually signed, and a Local Master cannot sign his report until the costs are finally revised and settled, *Waddell v. McColl*, 14 Gr. 211.

**250.** Reports affecting money in Court, or to be paid into Court, are to set forth in figures, in a schedule, a brief summary of the sums found by the report, and which may be paid or payable, into, or out of Court. (10th Sept. 1866; Ord. 16.)

**251.** As soon as the Master's report or certificate is prepared, it is to be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the Master, to any other party applying therefor; and a common attendance is to be allowed to the party taking the same. (3rd June, 1853; Ord. 42, s. 16.)

**252.** A report is to become absolute, without an order confirming the same, at the expiration of fourteen days after the

filing thereof, unless previously appealed from. (29th June, 1861.)

But see now Ord. 642, and note to Ord. 253.

Reports which did not require confirmation were, of the necessity of a commission, of scandal or impertinence, appointing receiver or consignee, on passing their accounts, computing subsequent interest, apportioning a fund, appointing trustees, approving a conveyance, and certificates of something done or not done or misdone, 1 Grant's Chy. Pr. (5th ed.) 339.

**253.** An appeal shall lie to the Court, upon motion, at any time after the signing of the report until the expiration of fourteen days from the filing of the same, in respect of the finding of the Master upon any matter presented in his office for his decision, without written objections or exceptions being previously taken. (29th June, 1861.)

This order differs from the original order of the 21st June, 1861, by providing for an appeal without *written* objections being taken; as to taking objections, see Ord. 248, and notes.

By Order 542 the time for appealing has been altered, and dates from the making and not the filing of the report. No report which requires confirmation, therefore, would now become absolute until a month had elapsed from its date, and fourteen days from its filing, *re* Eaton; Byers v. Woodburn, 8 Fr. R. 289. The cases which follow in this note, and in which fourteen days are spoken of, are still applicable, with the exception that the time is now one month instead of the fourteen days.

If any of the parties are dissatisfied with the Master's report, an appeal from it may be brought at any time within fourteen days after it is filed and the service of a notice of motion by way of an appeal within the fourteen days will prevent the report being confirmed, although the appeal may not be heard till after the expiry of the fourteen days, Grimshaw v. Parks, 6 U. C. L. J. 142.

When the fourteen days have been allowed to pass without serving notice of appeal, the Court may, under special circumstances, give leave to appeal; but such leave can be obtained only upon motion, notice of which must be given, Cozens v. McDougal 1 Ch. Ch. R. 29; Larkin v. Armstrong, 1 Ch. Ch. R. 31; Cade v. Newhall, 1 Ch. Ch. R. 200; and as to what should be shewn on such an application, see Thompson v. Walker, 1 Ch. Ch. R. 266. The Court will not extend time merely on account of ignorance of practice, Blaylock v. McFarlane, 15 C. L. J. 137.

A party having delayed for one day beyond the time allowed for appealing, the other side, instead of moving to set aside the proceeding, served notice of a cross appeal, it was held that the irregularity was thereby waived, Larkin v. Armstrong, 1 Ch. Ch. R. 31.

Where the Master made a clerical error in his report, apparent on the face of it, the Court made an order correcting the report on the *ex parte* application of the plaintiff, White v. Courtney, 1 Ch. Ch. R. 11; Watson v. Moore, 1 Ch. Ch. R. 266; but where the Master, in proceeding to take an account under a decree on further directions, finds he has made a mistake in taking the accounts under the original decree, he is not at liberty to correct such mistake by his subsequent report. The Master having, without the order of the Court, reviewed his first report, and corrected by his subsequent report an error found in the first, it was held that he had exceeded his jurisdiction, and that the objection being apparent on the face of the report, the objecting party was not driven to appeal, Crooks v. Street, 1 Ch. Ch. R. 78.

The Master's report is *prima facie* evidence of what it contains, unless appealed from, and no motion founded on such report can be entertained while the appeal is unheard, Nichols v. McDonald, 6 Gr. 504.

All applications in the nature of an appeal from a Master's judgment should be made in Court and not in Chambers, Ledyard v. McLean, 1 Ch. Ch. R. 183; Jay

*v. Macdonell*, 2 Ch. Ch. R. 71; and see *Gould v. Burritt*, 1 Ch. Ch. R. 250. As to apportioning costs where some grounds of appeal fail and others succeed, see *Bank of Montreal v. Ryan*, 13 Gr. 204.

There may, in a proper case, be an appeal from the Master's ruling as to the admissibility of evidence, before the Master makes his report, *McDonald v. Wright*, 12 Gr. 552.

Where an incumbrancer who objected to the order of priority in which he was placed, appealed from the finding of the Master, the Court considered this the more convenient form to adopt, although it was open to him, to have moved to discharge the Master's order, *McDonald v. Rodger*, 9 Gr. 75.

Where a party appealed from a report and some of the grounds of appeal were allowed, and the report referred back to be reviewed, an appeal will not lie against the further report thereon, for matters disposed of by the first report and not objected to on the appeal, *Ross v. Perrault*, 13 Gr. 206.

Where a reference back to the Master to review his report is directed, the Master is of course at liberty to receive further evidence; where the Court does not mean that he shall take further evidence, the order contains a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could not be material, *Morley v. Matthews*, 12 Gr. 453.

As to appeals since the Judicature Act, see O. XLIX., r. 13, *ante*.

**254.** Any party affected by a report may file the same, or a duplicate thereof, and the filing of a duplicate shall have the same effect as the filing of the report. (29th June, 1861.)

**255.** Where the master is directed to appoint money to be paid at some time and place, he is to appoint the same to be paid into some bank at its head office, or at some branch or agency office of such bank, to the joint credit of the party to whom the same is made payable, and of the Registrar of the Court; the party to whom the same is made payable to name the bank into which he desires the same to be paid, and the Master to name the place for such payment. (29th June, 1861.)

This Order is an extension of the Order of 29th June, 1861, which provided for the payment of mortgage money only at a bank.

By Order 569 the word "Accountant" was substituted for "Registrar" in this and the next following order, and by Order 628 all General Orders of the Court in which the word "Accountant" occurred, were to be read and construed as if the words "Referee in Chambers" were substituted for the word "Accountant."

Where before the day for payment the agency of the bank was closed, on motion to substitute another bank at the same place, it was held that a new day for payment must be fixed, and the order served, *King v. Connor*, 1 Ch. Ch. R. 274.

**256.** Where money is paid into a bank, in pursuance of such appointment, the party paying may pay the same either to the credit of the party to whom the same is made payable or to the joint credit of the party and the Registrar; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of the Court. (29th June, 1861.)

As to costs of obtaining an order for payment of the money, see *Bernard v. Alley*, 2 Ch. Ch. R. 91.



**257.** Where default is made in the payment of money appointed to be paid into a Bank, the certificate of the Cashier, Manager or Agent of the Bank, where the same is made payable, or of the like bank officer, shall be sufficient evidence of default. Where the affidavit of the party entitled to receive the same is by the present practice required, the same shall still be necessary. (29th June, 1861.)

The Bank certificate of non-payment should be made by the cashier or other like officer, the certificate of the accountant, as such, is not sufficient, *Campbell v. Garrett*, 1 Ch. Ch. R. 255.

## RECEIVERS.

**278.** The party prosecuting the order for a receiver is to obtain an appointment or a warrant from the Judge or Master, and to serve the same on all the necessary parties, naming in the copy thereof served the proposed receiver and his sureties. (3rd June, 1853; Ord. 38, s. 1.)

As to the powers of the Court in appointing receivers, see *Judicature Act*, s. 17, sub-s. 8.

**279.** At the time appointed, the party prosecuting the order is to bring into the Judge's Chambers or the Master's Office, the recognizance or bond proposed as security; the bond or recognizance is to be to the Master. (3rd June, 1853; Ord. 38, s. 1.)

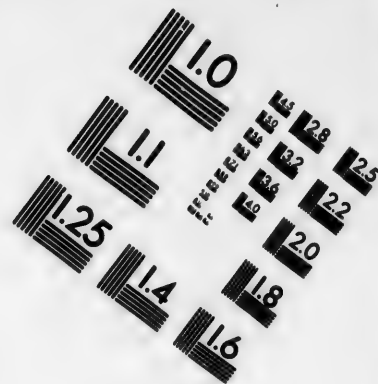
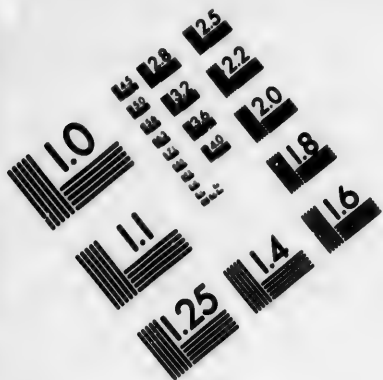
Evidence must be produced before the Master as to the nature and value of the property over which the receiver is to be appointed, in order that the amount for which security is to be given may be fixed.

**280.** Any other party desirous of proposing another person as receiver, is to serve notice of his intention so to do upon the other parties, naming in such notice the person proposed by him as receiver, and his sureties, and is then in like manner to bring into the Judge's Chambers or Master's Office, the recognizance or bond proposed by him as security. (3rd June, 1853; Ord. 38, s. 1.)

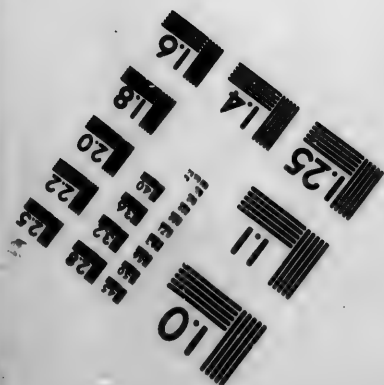
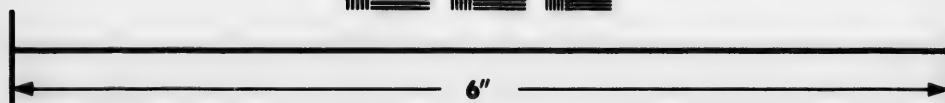
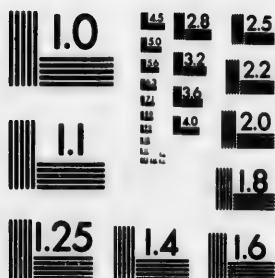
**281.** At the time named in the appointment or warrant the Judge or Master is, in the presence of the parties, or those who attend, to consider of the appointment of the receiver, and to determine respecting the same; and to settle and approve of the proposed security. (3rd June, 1853; Ord. 39, s. 1.)

A trustee may in some cases be a receiver, if he will act without emolument, *Sykes v. Hastings*, 11 Ves. 363; but no one who is a party to the suit, or solicitor, can be receiver with emolument, unless no one else can be got to act, *Garland v. Garland*, 2 Ves. 137; — *Jolland*, 8 Ves. 72; the next friend of an infant cannot be receiver, *Stone v. Wishart*, 2 Madd. 64.





# IMAGE EVALUATION TEST TARGET (MT-3)



Photographic  
Sciences  
Corporation

23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4903

18 20 22 25  
E E E E  
E E E E

10  
E E E E  
E E E E

**282.** The Master is to make no report approving of or appointing the receiver; but the Judge or Master is to appoint such receiver by signing a written appointment to the following effect, viz.: "IN CHANCERY, [*style of cause*—I hereby appoint [*receiver's name*] receiver in this cause [*signature of Judge or Master*];" which appointment is to be signed without any warrant or attendance for that purpose. (3rd June, 1853; Ord. 38, s. 1.)

Where an order directs the appointment of a receiver the Master, if the order contains no direction on the subject, is to fix the time or times in each year when the person appointed is to pass his accounts and pay his balances into Court, and in default of compliance with such direction the person appointed may, on the passing his accounts, be disallowed any salary or compensation for his services, and may be charged with interest upon his balances, Ord. 588.

**283.** When signed, the appointment is to be filed by the party who has procured the person named by him as receiver to be appointed, and is then to have the same effect as the filing of the Master's report appointing a receiver under the former practice; but the same is not to be filed until after the execution and filing of the securities settled and approved by the Judge or Master. (3rd June, 1853; Ord. 38, s. 1.)

A receiver is an indifferent person between the parties, appointed by the Court to receive the rents, issues and profits of lands, or any other thing in question pending the suit, where it does not appear reasonable to the Court that either party should do it; or where a party is incompetent to do so, as in the case of an infant. The appointment of a receiver rests in the discretion of the Court, *Skip v. Harwood*, 3 Atk. 564; *Owen v. Homan*, 3 Mac. & G. 378; and when appointed he is treated as the officer and representative of the Court, and is subject to its orders. A receiver, though an officer of the Court, stands in the position of trustee to all interested in the estate or fund; therefore in making the appointment the Court will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be brought into frequent communication, *Simpson v. Ottawa and Prescott Railway Company*, 1 Ch. Ch. R. 99.

A receiver having been appointed, it is the duty of the party to the record in possession of the property to deliver up possession to him, and if he refuses to do so, an order may be obtained upon motion that he do by a given day deliver up possession to the receiver, *Griffith v. Griffith*, 2 Ves. Sen. 400. Where the property is in the possession of tenants the order usually directs them to attorn and pay their rents in arrear, as well as the growing rents, to the receiver, *Simmons v. Ld. Kinnaid*, 4 Ves. 747. The receiver should apply to the tenants to attorn, and if any of them refuse, the party obtaining the appointment of the receiver should serve them with a copy of the order granting the receiver and of the certificate of his appointment, and with a notice of motion for an order that they do attorn within four days after service of the order or stand committed, *Reid v. Middleton*, T. & R. 455; and the Court will order the tenants to pay the costs of this motion, *Hobson v. Sherwood*, 19 Beav. 575; but see *Hobhouse v. Holcombe*, 2 D. & Sm. 208.

Any attempt to disturb the possession of the receiver, without the leave of the Court being first obtained, is a contempt on the part of the person making it, *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian Rail. Co.*, 3 Mac. & G., 104; and this rule extends to cases in which the receiver is appointed without prejudice to the right of persons having prior estates; and see *Bank of British North America v. Heaton*, 1 Ch. Ch. R. 175. If such persons wish to avail themselves of their

right, they must apply to the Court either for liberty to bring ejectment, or in the mode now substituted for the old examination *pro interesse suo*, *Bryan v. Cormick*, 1 Cox, 422; even though their right to possession is clear, *Anon*, 6 Ves. 287; and even although the order appointing the receiver is erroneous, *Ames v. Birkenhead Dock Trustees*, 20 Beav. 332.

The receiver's salary is generally fixed upon the passing of his first account, when he is allowed in his discharge a percentage upon his receipts by way of salary for his care and trouble. The usual percentage upon rents and profits of real estate is five per cent. on the gross rental; but this is the *maximum*. He may be entitled to allowances beyond his salary for any extraordinary trouble or expense he has been put to in the performance of his duty, *Potts v. Leighton*, 15 Ves. 276; but the Court will not sanction such allowances, if objected to, unless he has had the previous approbation of the Court for what he has done, *re Ormsby*, 1 B. & B. 189; *Malcolm v. O'Callaghan*, 3 M. & C. 52; *Bristow v. Needham*, 2 Phill. 190; and see *Simpson v. Ottawa and Prescott Railway Company*, 1 Ch. Ch. R. 99.

After tenants have attorned or paid rents to the receiver, he may distrain for rent in arrears; and he may in the case of a tenant from year to year, who has attorned, give notice to determine the tenancy, *Doe v. Read*, 12 East 59; but he cannot bring ejectment without the sanction of the Court, *Wynne v. Ld. Newburgh*, 1 Ves. 164.

Where a receiver finds it necessary to sue for debts due an estate, an application for permission to do so must be made, supported by affidavits shewing the expediency of such proceedings, *Thomas v. Torrance*, 1 Ch. Ch. R. 9.

It is the duty of a receiver to pass his accounts regularly in the manner prescribed by the order under which he is appointed, and if he does not, he may be deprived of his salary, and charged with interest on the balance in his hands, *Ward v. Swift*, 8 Hare, 139. If a receiver does not bring in his accounts at the proper time, the party desiring them to be brought in may claim a warrant for that purpose, and upon default he may have an attachment against the receiver. When the receiver brings in his accounts, but does not proceed upon them, the party prosecuting the decree takes out a warrant to proceed upon the accounts and serve all necessary parties; if the receiver does not attend on the return of the warrant to support his accounts, the Master allows all the sums with which he has charged himself, and disallows his payments for want of being vouched, *Bertie v. Ld. Abingdon*, 8 Beav. 53.

To enforce payment of the balance reported due, an order should be obtained upon notice, for him to pay the amount within a given time, *Davies v. Cracraft*, 14 Ves. 143; and if the order be not complied with, a writ of *fi. fa.* may be issued, and the recognizance or bond put in suit. An order must be obtained for leave to sue upon the bond, and if the sureties are to be proceeded against, notice of motion must be served upon them, *Ludgater v. Channell*, 15 Sim. 482.

The sureties for a receiver cannot be discharged at their own request, *Griffith v. Griffith*, 2 Ves. Sen. 400; *Gordon v. Calvert*, 2 Sim. 253; but this rule will yield to circumstances, as where underhand practice is proved, and the person secured is shewn to be connected with it, *Hamilton v. Brewster*, 2 Moll. 407. On moving to vacate a receiver's recognizance, notice must be given to all parties, *Brown v. Perry*, 1 Ch. Ch. R. 253. With respect to the sureties' liability, it extends to all the receiver would be liable to pay, *Dawson v. Raynes*, 2 Russ. 466.

Where a surety of a receiver dies pending the suit, the receiver may obtain, *ex parte*, an order referring it to the Master to approve of a new one, *Baldwin v. Crawford*, 1 Ch. Ch. R. 264.

Where a receiver made an investment unauthorized by the Court, by which a profit was made, the amount realized was directed to be added to the principal, *Baldwin v. Crawford*, 2 Ch. Ch. R. 9.

#### SALES.

**374.** Where a sale is to take place under an order of the Court, no copy of the order, or any part thereof, is to be brought into Chambers, or the Master's office, but the original order is

to be used, unless the Judge or Master requires a copy. (3rd June, 1853; Ord. 36, s. 1.)

**375.** An appointment or warrant in respect of the sale is to be obtained from the Judge or Master, and served upon all necessary parties. (3rd June, 1853; Ord. 36, s. 2.)

**376.** At the time appointed thereby, the party having the conduct of the sale, is to bring into Chambers, or the Master's office, a draft advertisement, but no particulars or conditions of the sale, or any draft or copy thereof. (3rd June, 1853; Ord. 36, s. 3.)

Usually the plaintiff has the conduct of the sale, *Dale v. Hamilton*, 10 Hare, app. 7; though the Court may give it to another, in a proper case, as where plaintiff had liberty to bid, *Dixon v. Pyner*, 14 Jur. 218; see *Knott v. Cottee*, 27 Beav. 33. When a sale is asked by a defendant in a foreclosure suit, the Court may require the party asking it to conduct the sale at his own expense, Ord. 430; but see *Taylor v. Walker*, 3 Gr. 506.

Where property has been put up for sale under an order of the Court, but the sale has proved abortive for want of bidders, the property may be advertised, and put up for sale again without further order, *Sherwood v. Campbell*, 1 Ch. Ch. R. 299; *Martin v. Purdy*, 1 Ch. Ch. R. 263.

**377.** The advertisement is to contain the following particulars:—(1) The short style of cause; (2) That the sale is in pursuance of an order of the Court; (3) The time and place of sale; (4) A short and true description of the property to be sold; (5) The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots; (6) What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with or without interest; (7) Any particulars in which the proposed conditions of sale differ from the standing conditions. (3rd June, 1853; Ord. 36, s. 4.)

Advertisements for sales under the direction of the Court should be as short as possible; the short style of the cause and a short description of the property and improvements is sufficient, and no merely formal parts, such as convey no information to intending purchasers, should be inserted, *Baxter v. Finlay*, 1 Ch. Ch. R. 230; *Buchan v. Wilks*, *Ibid.*, 231, n. An advertisement for the sale of property under a decree should set out all the improvements on the property, otherwise it will be referred back to the Master to re-settle the advertisement, and appoint a new day for the sale, *Heward v. Ridout*, 1 Ch. Ch. R. 244.

Misdescription in the advertisement, where it amounts to a material representation, is ground for compensation, even after conveyance, *Bull v. Harper*, 6 Pr. R. 36. An inadequate description of the property in the advertisement will be a sufficient ground for opening biddings, if calculated to mislead or deter the public from purchasing, but not otherwise. Exceptions of this kind, amounting only to a complaint that all the advantages of the property have not been sufficiently dwelt upon in the advertisement, should be taken upon the settling of the advertisement, *Creswick v. Thompson*, 6 Pr. R. 52. The omission to state that the premises are leased advantageously will afford good ground for staying the sale, but an applica-

tion for such purpose should be made promptly and before the sale, *McAlpine v. Young*, 2 Ch. Ch. R. 171. Where an irregularity had occurred in advertising, but no injury had thereby accrued, and a fair price had been obtained, the sale was confirmed, *Cayley v. Colbert*, 2 Ch. Ch. R. 455.

**378.** At the time named in the appointment or warrant, the Judge or Master is to settle the advertisement; to fix the time and place of sale; to name an auctioneer, where one is to be employed; and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before-mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant, where it is practicable; and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it is unavoidable. (3rd June, 1853; Ord. 36, s. 5.)

**379.** The standing conditions of sale are to be those set forth in schedule P. (3rd June, 1853; Ord. 36, s. 13.)

Schedule P. is as follows:—

1. No person shall advance less than \$10 at any bidding under \$500, nor less than \$20 at any bidding over \$500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the suit, with the exception of the vendor, (and, *naming any parties, trustees, agents, or others, in a fiduciary situation,*) are to be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down a deposit, in the proportion of \$10 for every \$100 of his purchase money, to the vendor or his solicitor; and shall pay the remainder of the purchase money, on the day of next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser, at the time of sale, to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and the premises may be re-sold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

Under number five of these conditions, a purchaser, when the sale is on credit, must prepare the mortgage at his own expense, *Fahner v. Ran*, 1 Ch. Ch. R. 246; and he must also pay the fees for its registration, *Sweetnam v. Sweetnam*, 6 Pr. R. 83. The purchaser makes a sufficient tender of the conveyance for execution, by delivering it to the vendor's solicitor; and it is the duty of the vendor to procure its execution by all necessary parties, *Weiss v. Crofts*, 6 P. R. 151.

**380.** The Judge or Master may, without further order, fix an upset price or reserved bidding, where it is thought expedient; but this must be done at the meeting before mentioned, and it must be notified in the conditions of sale. (3rd June, 1853; Ord. 36, s. 7.)

Where the plaintiff on the settlement of the advertisement neglected to ask for a reserved bidding, and the advertisement was issued, liberty to have a reserved bid was given in Chambers, and the advertisement altered accordingly, *Fraser v. Bens*, 1 Ch. Ch. R. 71.

Whether the reserved bidding should be communicated to the parties or not, is in the Master's discretion, *Jervoise v. Clarke*, 1 J. & W. 391.

**381.** All parties may bid, without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents and other persons in a fiduciary situation; and where any parties are to be at liberty to bid, it must be notified in the conditions of sale. (3rd June, 1853; Ord. 36, s. 7.)

**382.** The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the Judge or Master appointed at the meeting before mentioned. (3rd June, 1853; Ord. 36, s. 6.)

**383.** The Master or his Clerk is to conduct the sale where no auctioneer is employed. (3rd June, 1853; Ord. 36, s. 7.)

**384.** Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale. (3rd June, 1853; Ord. 36, s. 7.)

A solicitor having the conduct of a sale, cannot withdraw the property offered after a bid has been made, *McAlpine v. Young*, 2 Ch. Ch. R. 85; upon a sale without reserve, it is not open to the vendor to refuse a bid, however small, *O'Connor v. Woodward*, 6 Pr. R. 223.

**385.** The deposit is to be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and is to be forthwith paid by him into Court. (3rd June, 1853; Ord. 36, s. 7.)

Where the party having the conduct of the sale, neglects to pay into Court the deposit paid to him by the purchaser at the time of sale, the Court will, on the application of the purchaser, order him to do so, *Crooks v. Glenn*, 1 Ch. Ch. R. 354.

**386.** After the sale is concluded, the auctioneer, where one is employed, is to make the usual affidavit according to the present practice; and where no auctioneer is employed, the Master or his Clerk is to certify to the same effect. (3rd June, 1853; Ord. 36, s. 7.)

**387.** The report on sale is to be in the form set forth in schedule Q, or as near thereto as circumstances permit. Schedule Q is as follows:—

IN CHANCERY (*Style of Cause*).—Pursuant to the decree (or order) of this Honourable Court, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, and made in this cause,



I have, under the General Orders of this Court, in the presence of (or, after notice to) all parties concerned, settled an advertisement and particulars and conditions of sale, for the sale of the lands mentioned or referred to in the said decree (or order), and such advertisement having, according to my directions, been published in the (naming the newspaper or newspapers), once in each week for the weeks immediately preceding the said sale (or as the case may be), and bills of the said sale having been also, as directed by me, published in different parts of the township (town or city) of and the adjacent country and villages. (or as the case may be), the said lands were offered for sale by public auction, according to my appointment, on the day of , by me (or by Mr. of , appointed by me for that purpose, auctioneer,) and such sale was conducted in a fair, open, and proper manner, when , of , was declared the highest bidder for, and became the purchaser of the same, at the price or sum of \$ , payable as follows (set out shortly the condition of sale as to payment of the purchase money).

All which, having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this Honourable Court. Dated .

The confirmation of a sale may be opposed before the Master, and the sale disallowed on grounds which would afford material for a motion to set aside the sale, *Beatty v. Radenhurst*, 3 Ch. Ch. R. 344.

When a sale has been held, and the Master's directions have not been followed, the vendor must show, at his own expense, that no person interested has been injured by the non-observance of the directions; otherwise the sale will not be confirmed, *Royal Canadian Bank v. Dennis*, 4 Ch. Ch. 68; a motion in Chambers to confirm a sale where an irregularity has occurred will not be entertained, unless the sale has been approved of by the Master, *Thomas v. McCrae*, 2 Ch. Ch. 456. A purchaser at a sale under a decree has a right to take out the report on sale and get it confirmed, so as to obtain a completion of the purchase to himself, at least where he is the sole purchaser, *Crooks v. Gler*, 1 Ch. Ch. 354.

**388.** A sale must be objected to by motion to the Court to set aside the same; and notice of the motion must be served upon the purchaser, and on the other parties to the cause; but the biddings are only to be opened on special grounds, whether the application is made before or after the report stands confirmed. (3rd June, 1853; Ord. 36, s. 10; 20th Dec. 1865; Ord. 21.)

Where one of the testator's sons bid at a Chancery sale of his father's property, such bidding being by those present supposed to be for himself, but being in reality for another person, who had secretly employed the son to bid under the expectation that there would be less competition against the son than against a stranger, and the property was knocked down to the son, but the contract was signed by the principal, and it appeared that the effect of the son's bidding, had been to deter others from bidding, the Court holding this to be a surprise on the other bidders and an unjust advantage to the purchaser, refused to enforce the purchase, and directed a re-sale at the risk and cost of the purchaser, *Rodgers v. Rodgers*, 13 Gr. 143.

The Court is strongly disinclined to open biddings unless very special grounds are shewn. The fact alone that a price can be obtained in advance upon that realized at the sale, does not constitute such a special ground, *Creswick v. Thompson*, 6 Pr. R. 52; biddings will not be opened merely upon the offer of an advanced price, whether the purchaser at the sale is a stranger to the suit, or a party allowed by an order of the Court to bid, *Mitchell v. Mitchell*, 6 Pr. R. 232; and see *McRoberts v. Durie*, 1 Ch. Ch. R. 211; *Crooks v. Crooks*, 2 Ch. Ch. R. 29.

Biddings will not be opened and the sale set aside on the ground that a party (the defendant) was prevented from bidding by promises made to him by the purchaser; such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit, *Brook v. Saul*, 2 Ch. Ch. R. 145.

A purchaser at a sale under a decree is not bound by any irregularity in the proceedings so as to cause him to lose the benefit of his purchase, *Dickey v. Heron*, 1 Ch. Ch. R. 149.

**389.** At any time after the confirmation of the sale the purchaser may pay his purchase money and interest, if any, or the balance thereof, into the Court without further order, upon notice to the party having the conduct of the sale; and when he is entitled to be let into possession of the estate, he may, if possession is wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause possession to be delivered to him. (3rd June, 1853; Ord. 36, s. 11.)

Where money is ordered to be paid into Court, a payment to the solicitor of the party entitled to it is not a good one, and therefore is no ground for dispensing with payment into Court, *Blackburn v. Sheriff*, 1 Ch. Ch. R. 208.

A purchaser of real estate, at a sale under a decree, will not be ordered to pay the amount of his purchase money into Court until the title has been accepted or approved of, *Crooks v. Street*, 1 Ch. Ch. R. 95; but see *Stewart v. Stewart*, 1 Ch. Ch. 243.

If the purchaser neglect to pay in his purchase money, and no objection is made to the title, the Court will order him within a limited time to pay in the amount with interest, and in default direct a re-sale of the property, and that the purchaser pay costs of the motion and deficiency, if any, on re-sale, *Crooks v. Crooks*, 4 Gr. 376; but if the purchaser become insolvent, and unable to complete the contract he will be discharged from it, *Heely*, 1 Ch. Ch. R. 54; and see *re Yaggie*, *Ibid*, 52.

**390.** After a sale under an order is confirmed, the vendor is, forthwith upon demand, to deliver an abstract of title to the purchaser; and if the purchaser does not serve objections within seven days, he is to be deemed to have accepted the abstract as sufficient. If objections are served, the vendor is to answer them within fourteen days; and if the purchaser is still dissatisfied, and if the parties cannot otherwise agree, either party may obtain from the Master a warrant to consider the abstract.

Where the title or the proof of it is involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title or any title-deeds or copies thereof, other than such as are in his possession, or procure any abstract," was held to be very objectionable, and should not be sanctioned by Masters, even by consent, *McDonald v. Gordon*, 2 Ch. Ch. 125. See now the Act to amend the law of Vendor and Purchaser, and to simplify Titles, R. S. O., c. 109. A clause in the conditions of sale that the vendors shall only produce certain title deeds and an abstract of the register, and that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from shewing otherwise a good title, *The Canada Permanent Building Society v. Wallis*, 8 Gr. 368.

A purchaser who enters into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title, unless the sanction of the Court has been obtained to his entering into possession, without waiving his right to call for a good title, *Patterson v. Robb*, 6 Fr. R. 114; but the objection that by going into possession the purchaser had accepted the title was held to be waived by the vendor afterwards delivering an abstract and answering requisitions, *Aldwell v. Aldwell*, 6 Fr. R. 183. Where, after a sale under a decree, an abstract had not been demanded, and no steps had been taken by the purchaser for twenty-three months after the confirmation of the report, a reference as to title was refused, and the purchaser held to have accepted the title, *Ontario Bank v. Sim*, 6 Fr. R. 216. The party having the conduct of the

sale represents, for the purposes of the sale, so far as the purchaser is concerned all the other parties to the suit, and it is his duty to remove, or procure to be removed, any objection which may properly be made to the title, *Street v. Hallett*, 6 Pr. R. 312.

On moving to make an order nisi for not delivering an abstract of title absolute, it is necessary to shew that it has not been delivered to either party named in the order, *Dick v. McNab*, 1 Ch. Ch. R. 31.

**391.** The Master is to determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, he may permit the purchaser to supply defects therein, at the vendor's expense.

A purchaser, on receipt of the abstract, is bound within seven days to take all the objections he intends to take to the sufficiency of the abstract. These being removed, it is not open to the purchaser to take any further objections to the sufficiency of the abstract; he can only require the vendors to verify the title shewn on the abstract, *Bank of Montreal v. Fox*, 6 Pr. R. 217. If the purchaser takes his objections to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine him to the objections he has made to the title, no objections other than those specifically taken will be ascertained, *McManus v. Little*, 3 Ch. Ch. R. 263.

**392.** The Master is not to make a report on the abstract, but is to mark the objections as allowed or disallowed, as the case may be; and when he finds the abstract perfect, or as perfect as the vendor can make it, he is to certify to that effect at the foot or on the back; and such finding is to be final unless appealed from within fourteen days thereafter.

**393.** After an abstract is confirmed, or is accepted by the purchaser as sufficient, no objection to the abstract is to be allowed.

**394.** After acceptance or confirmation of the abstract, the verification is to be proceeded with, and the vendor is with all diligence to afford the purchaser all the means of verification in his power, in the manner, and according to the practice usual with conveyancers; and after having done so, he may serve a notice on the purchaser to make his objections or requisitions, if any, within seven days, or that otherwise he will be deemed to have accepted the title.

A vendor does not shew a good title by furnishing an abstract shewing on the face of it a good title; he must verify such abstract, *Granger v. Latham*, 14 Gr. 209. The vendor is bound, at his own expense, to furnish the purchaser with copies of all instruments relating to the title which are not of record, *re Charles*, 4 Ch. Ch. R. 19; a purchaser is entitled to copies of title deeds registered by memorials, but not of deeds registered under the Registry Act of 1867 R. S. O., c. 111, *ib.*

**395.** Upon being served with such notice, the purchaser if dissatisfied, is to serve his objections, or requisitions within the time thereby limited; and the like course is to be followed upon such objections or requisitions as is prescribed by Orders 390, 391, and 392, in relation to the abstract.

**396.** In case of the refusal or neglect of the vendor to verify any portion of the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense.

**397.** The foregoing Orders, 390, 391, 392, 393, 394, 395, and 396, are to apply to all cases of reference to the Master as to title, as well as to sales by the Court.

#### MORTGAGE SUITS.

**426.** Instead of foreclosure, the bill in any mortgage suit, may pray a sale of the mortgaged premises, and that any balance of the mortgage debt remaining due after such sale may be paid by the mortgagor, and the same may be decreed accordingly. (3rd June, 1853; Ord. 32, s. 3.)

A mortgagee is entitled to a decree for a sale or foreclosure, at his option as against the mortgagor, *Meyers v. Harrison*, 1 Gr. 449.

The Court will not make a personal order against the mortgagor under this section, unless asked by the prayer of the bill.

Where in a bill praying foreclosure only, a decree for sale was drawn up with a direction that the mortgagor should pay any deficiency, the Court, at the instance of the mortgagor, four years afterwards, amended the decree by striking out this direction, but ordered the mortgagor to pay the costs of the proceedings which had been taken under the decree, *Cochennour v. Bullock*, 12 Gr. 138.

The owner of land, after creating a mortgage thereon, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, and afterwards became the purchaser of the mortgaged premises, under a decree at the suit of the mortgagee; the amount realized at the sale not being sufficient to cover the amount due on the mortgage, the mortgagee was held not entitled to any lien on the premises for the deficiency, *Forbes v. Adamson*, 1 Ch. Ch. R. 117.

Where the decree directs foreclosure, the Court may, on default in payment, grant an order for sale without re-hearing the cause, *Laalett v. Cliffe*, 2 Sm. & G. 278; overruling, *Girdlestone v. Lavender*, 9 Ha. app. 53; see also, *Wayn v. Lewis*, 22 L. J. Ch. 1051. But the Court will not after a decree for sale, order a foreclosure without re-hearing the cause, and notice of the re-hearing must be served on the defendant, even although the bill has been taken *pro confesso*, *McLellan v. Jacobs*, 9 Gr. 50.

**427.** Where any person is surety for the payment of a mortgage debt, such person may be made a party to a suit for the sale of the mortgaged property, and the relief specified in the last Order may be prayed against both the mortgagor and

his surety, and the same may be decreed accordingly. (3rd June, 1853; Ord. 32, s. 4.)

Where there is only one principal and one surety both must be made parties to a bill for foreclosure or sale, *Seidler v. Sheppard*, 12 Gr. 456; where a mortgage is given by a surety on his own property, the principal is a necessary party to a suit for a foreclosure of the mortgage, *Id.*

As to joinder of causes, see Judicature Act, O. XIII.

**428.** The Court may direct a sale of the property, instead of a foreclosure of the equity of redemption, on such terms as the Court thinks fit; and, if the Court thinks fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem. (3rd June, 1853; Ord. 32, s. 2.)

*sale*  
A sale will not be ordered until the mortgagor has had the usual time to redeem, *Trust and Loan Co. v. Reynolds*, 2 Ch. Ch. R. 41. Some special ground must be shewn to induce the Court to depart from the ordinary rule of allowing six months for redemption, *Rigney v. Fuller*, 4 Gr. 198. An order for an immediate sale will not be made in Chambers, where the Master, pursuant to a decree made in Court, has fixed a day for payment, and it has not arrived, the motion must be made to the Court, *Buell v. Fisher*, 6 Pr. R. 51.

**429.** If the request for a sale is made by a subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the party making the request is to deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court thinks fit to impose. (3rd June, 1853; Ord. 32, sec. 2.)

The deposit has, for ordinary cases, been fixed at \$80. Where a subsequent incumbrancer paid \$80 into Court and obtained a sale which proved abortive, and the costs were taxed at \$165—Held that he could not be compelled to pay the difference between the deposit and the taxed costs; and that the plaintiff should have objected to the deposit as being insufficient before the sale took place, *London and Canadian Loan and Agency Co. v. Pulford*, 7 Pr. R. 432. Where a subsequent incumbrancer has obtained a sale under this Order an application to increase the deposit must be made before the sale is acted upon, *London and Canadian Loan and Agency Company v. Morrison*, 7 Pr. R. 450; and it was held that an order could not be made against the mortgagor to increase the deposit, *Cruso v. Close*, 8 Pr. R. 33.

After a decree of foreclosure, an application by the defendant for an order for sale, the property mortgaged being worth \$1,000, and the mortgage being for \$157, and that the usual deposit might be dispensed with, was refused, *Thompson v. Macaulay*, 3 Ch. Ch. R. 111. The trustee of a mortgaged estate asking a sale in a suit for foreclosure, is not released from the payment of the usual deposit, *Macell v. Campbell*, 5 U. C. L. J. 117.

**430.** If before, or upon the deposit to obtain a sale being made, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect; and he is thereupon to notify the defendant of such election. The notice may be to the effect set forth in schedule R.

Schedule R. is as follows :—  
IN CHANCERY.

(Short title.)

To ———, defendant. Take notice that the plaintiff elects that the sale of the mortgaged premises be conducted by you instead of by the plaintiff, and you are at liberty to withdraw the deposit made by you in this cause for the purpose of such sale.

The defendant is not entitled to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without paying in the usual deposit, upon his undertaking the conduct of the sale, *Taylor v. Walker*, 8 Grant, 506.

431. Upon the plaintiff's filing with the Registrar a note of such election, and proof of service of such notice, the defendant making the deposit is to be entitled to a return thereof. (20th Dec. 1865; Ord. 10.)

432. Where the cause is heard upon an order to take the bill *pro confesso*, in a suit for foreclosure or sale, and no reference as to incumbrances is required, the plaintiff is to produce at the hearing :—(1) The mortgage deed, and the assignments thereof, if any; (2) An affidavit which is to state the amount advanced upon the security; the amount paid, whether by receipt of rent or otherwise; and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them, have been in the occupation of the mortgagee or of any one under whom he claims; and, when there has been any such occupation, the affidavit is to state its nature, the time it continued, and the fair rentable value of the property. (3rd June, 1853; Ord. 32, s. 7.)

By O. IX., r. 11, of the Judicature Act, where the action is in respect of a mortgage, and the plaintiff claims foreclosure or sale or redemption, or where the action is for the administration of an estate, or for a partition, the plaintiff shall be entitled to a judgment or order on *precipe* to the Registrar, Deputy-Registrar, Local Registrar, or Clerk or Deputy-Clerk of the Crown and Pleas, as the case may be, on such evidence (if any) and in such cases (as nearly as may be), as provided for by the present practice of the Court of Chancery in that behalf.

433. Upon production of such proofs and documents, the Court may at once determine the amount due, and appoint the time and place for the payment of the mortgage money, by the decree, without a reference to the Master, or any further enquiry. (3rd June, 1853; Ord. 32, s. 7.)

434. In an ordinary suit of foreclosure or sale against an infant heir or devisee of the mortgagor, or of the assignee of the mortgagor, where no defence is set up in the infant's answer, the cause is not to be set down to be heard in Court by way of motion for a decree; but after the infant's answer is



filed, or after the time for filing the same has expired, the plaintiff is to file affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to a decree, and is to apply for the decree in Chambers, upon notice to the infant's solicitor. (1st April, 1867; Ord. 2.)

A motion may be made in Chambers for a decree under this Order, although an adult is interested as well as an infant, and the Order applies to suits for redemption also, Order 645; and where the notice is given in pursuance of Order 647, the decree may embrace the additional relief which can be given in mortgage cases under the Administration of Justice Act for the immediate delivery of possession or immediate payment of the mortgage money, Order 646. This Order is also extended to suits for redemption, Order 646.

Since the passing of this order any decree may be issued on *præcipe* which the Court could formerly make on a hearing *pro confesso*, *Kirkpatrick v. Howell*, 22 Gr. 94.

In decrees of foreclosure against infant defendants, a day to shew cause after attaining twenty-one, must be reserved to the defendants, *Mair v. Kerr*, 2 Gr. 223; and the final order of foreclosure must also reserve a day to shew cause. But where a decree for foreclosure is made against the ancestor of the infants, it is not necessary where the suit is revived against the infants, to insert in the final order a day for the infants to shew cause, *Sutherland v. Dickson*, 2 Ch. Ch. R. 25.

Infants made parties by revivor, cannot set up a defence which their ancestor had not set up, unless he had been prevented by fraud or mistake from pleading it, *Burke v. Pyne*, 2 Ch. Ch. R. 193.

Where the heirs of the mortgagor are infants, and a bill is filed against them for foreclosure, the rule of the Court is to grant a reference as of course, to inquire whether a sale or foreclosure is more for the benefit of the infants, but if affidavits are filed to satisfy the Court as to the proper decree, or if the guardian consents, the reference may be dispensed with, *Dudley v. Berczy*, 13 Gr. 141; but see *Graham v. Davis*, 2 Ch. Ch. R. 24. Where the decree directed an inquiry whether a sale or foreclosure would be more beneficial for the infants, and the report made under the decree did not find in favour of either sale or foreclosure, but was silent on the subject, a final order for sale was refused, *Edwards v. Burling*, 2 Ch. Ch. R. 48.

As to practice since the Judicature Act, see O. IX., r. 11, quoted in notes to Order 432.

**435.** Where the defendant answers the bill, admitting the execution of the mortgage and other facts, if any, entitling the plaintiff to a decree, or where the defendant disclaims any interest in the mortgaged premises, or where no answer is put in to the bill, the plaintiff is, on *præcipe* to the Registrar, to be entitled to such a decree as would under the practice of the Court have been made upon the hearing of the cause *pro confesso*. (20th Dec. 1865; Ord. 11.)

Where in a foreclosure suit, an injunction has been granted, the Registrar cannot issue a decree on *præcipe* continuing the injunction, but the cause must be brought on for hearing, *King v. Freeman*, 1 Ch. Ch. R. 350.

Where proceedings are taken against an absent defendant by advertisement a decree cannot be granted on *præcipe*, *M'Michael v. Thomas*, 14 Gr. 249; nor where defendant is not personally served, *Glass v. Moore*, 2 Ch. Ch. R. 327.

O. XI., r. 10, of the Judicature Act is as follows:—Where the action is for the foreclosure or redemption of a mortgage, or sale of mortgaged premises, if the plaintiff is not entitled to a judgment or order on *præcipe*, or would not according to the practice of the Court of Chancery be entitled on *præcipe* to such a judgment



or order as he desires, he shall be entitled to the proper judgment or order, on notice or otherwise, according to the practice of the Court of Chancery where a cause is heard on an order to take the bill *pro confesso* or otherwise.

**436.** Where no answer is filed, the decree is to be drawn up upon production of an office copy of the bill and an affidavit of the service thereof, shewing the same to have been indorsed with the notice set forth in schedule S. hereunder written.

The schedule S. is as follows :—

Your answer is to be filed at the office of the (Clerk of Records and Writs or Deputy Registrar) at \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_.

You are to answer or demur within \_\_\_\_\_ weeks from the service hereof.

If you fail to answer or demur within the time above limited, or if you answer admitting the execution of the mortgage and other facts stated in the bill as entitling the plaintiff to a decree, you are to be subject to have a decree or order made against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

NOTE.—This bill is filed by \_\_\_\_\_, of \_\_\_\_\_, in the county of \_\_\_\_\_ solicitor for the above named plaintiff.

"And take notice, that the plaintiff claims that there is now due by you, for principal money and interest, the sum of \_\_\_\_\_, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up; and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed (i.e. sold) unless before the time allowed you as by this notice for answering, you file in the office above named, a memorandum in writing, signed by yourself or your solicitor to the following effect: *dispute the amount claimed by the plaintiff in this cause*; in which case you will be notified of the time fixed for settling the amount due by you, at least four days before the time to be so fixed. (*In case foreclosure is prayed by the plaintiff add:*) If you desire a sale of the mortgaged premises instead of a foreclosure, you must, within the time allowed you to answer, file in the office above named a note or memorandum in writing, signed by yourself or your solicitor, to the following effect:—"I desire a sale of the mortgaged premises in the plaintiff's bill mentioned, or a competent part thereof, instead of a foreclosure;" and deposit the sum of \$80 to meet the expenses of such sale.

Where an order for immediate possession is prayed there must be added:—

"And the plaintiff will be entitled to an order for the immediate delivery of possession of the mortgaged premises to him."

And where an order for immediate payment is prayed add:—

And the plaintiff will be entitled forthwith to execution against the goods and lands of you (*naming the defendant against whom the plaintiff is entitled to the relief*), to recover payment of the amount due by you.

For forms under the Judicature Act, see Forms, No. 9.

On taking the account in a foreclosure suit no more can be found due than the amount claimed by the indorsement on the bill, *Boyd v. Wilson*, 1 Ch. Ch. R. 258.

**437.** The notice under Order 436, is to specify whether the plaintiff desires a foreclosure of the equity of redemption, or a sale of the mortgaged premises. (20th Dec., 1865; Ord. 9.)

Where the indorsement did not specify whether sale or foreclosure of the mortgaged premises was sought, the service of the bill was set aside, *Drewry v. O'Neil*, 2 Ch. Ch. R. 204.

**438.** Where it appears conducive to the ends of justice that parties interested in the equity of redemption should be allowed

to be made parties in the Master's office, by reason of the parties so interested being numerous or otherwise, the Court may direct that parties so interested be made parties in the Master's office, upon such terms as to the Court seems fit; such order to be made only where one or more parties interested in the equity of redemption are already before the Court. (29th June, 1861.)

An order to make persons interested in the equity of redemption parties in the Master's office will not be granted *ex parte*; notice should be served on the owners of the equity of redemption already before the Court, but not on those proposed to be added, *Penner v. Caniff*, 1 Ch. Ch. R. 351; but see, *Cummins v. Harrison*, 1 Ch. Ch. R. 369.

Where after a final order of foreclosure had been obtained, it was sought to add, as a party, a person who had purchased part of the mortgaged property, but who had not been made a party to the suit, either by bill or in the Master's office, *Vankoughnet C.*, though granting a fiat on the petition, expressed a strong opinion that no order could be made thereon, *Orford v. Bailey*, 1 Ch. Ch. R. 272; see also *Portman v. Paul*, 10 Gr. 458.

Where under an order in Chambers after decree, parties are added as being interested in the equity of redemption, an application to set aside the order must be made to the Court and not in Chambers, *Tice v. Meyers*, 3 U. C. L. J. N. S. 102.

The application in the first instance is in Chambers, *Harrison v. Grier*, 2 Ch. Ch. R. 440.

**439.** Where the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause.

**440.** Where the plaintiff prays a sale or foreclosure, subject to a prior mortgage, the prior mortgagee is not to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the bill. (6th Feb. 1858.)

**441.** Decrees for foreclosure or sale, where a reference is required, are, after the proper recitals hitherto in use, to direct, in general terms, that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure (or for redemption or sale *as the case may be*), and that for these purposes the cause is referred to (*naming the Master*); and a decree so expressed is to be read and construed as if the same set forth the particulars contained in the next thirteen Orders.

Where a plaintiff in a suit for foreclosure or sale asks a reference to the Master to inquire as to incumbrancers, he takes such a reference at the peril of costs, if there are in reality no incumbrancers, *Hamilton v. Howard*, 4 Gr. 581.

**442.** Upon such reference the Master is to inquire and state, whether any person or persons, and who other than the plaintiff, has or have any lien, charge or incumbrance upon

the lands and premises embraced in the mortgage security of the plaintiff, in the bill mentioned subsequent thereto.

Where a judgment has been recovered *pendente lite*, it is not necessary to make the judgment creditor a party, *Wallbridge v. Martin*, 2 Ch. Ch. R. 275.

**443.** The plaintiff is to bring into the Master's office certificates from the Registrar and Sheriff of the County wherein the lands lie, setting forth all the incumbrances which affect the property in the pleadings mentioned, and such other evidence as he may be advised.

**444.** The Master is to direct all such persons as appear to him to have any lien, charge, or incumbrance upon the estate in question, to be made parties to the cause, and to be served with a notice in the form set forth in schedule T hereunder written. (6th Feb. 1880.)

The notice referred to is as follows :—

IN CHANCERY.

Between A. B., Plaintiff,  
and  
C. D., Defendant.

Whereas a suit has been instituted by the above named plaintiff for the foreclosure (or sale) of certain lands, being (*insert description of lands*) and I have been directed by the decree made in this cause, and dated the       day of       , to inquire whether any person, other than the plaintiff, has any charge, lien, or incumbrance upon the said estate. And whereas it has been made to appear before me that you have each some lien, charge or incumbrance upon the said estate, and I have therefore caused you each to be made a party to this suit, and appointed the       day of       , at       o'clock in the       noon, for you to appear before me, at my Chambers at       , either in person, or by your solicitor, to prove your claims.

Now you are hereby required to take notice: 1st. That if you wish to apply to discharge my order making you a party, or to add to, vary, or set aside the decree you must do so within fourteen days from the service hereof; and if you fail to do so, you will be bound by the decree, and the further proceedings in this cause as if you were originally made a party to the suit. 2nd. That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., Master.

To

Persons so added are parties from the date of the Master's order, making them so, *Sterling v. Campbell*, 1 Ch. Ch. R. 147.

When a mortgagee takes proceedings to foreclose against the mortgagor and the estate of a deceased mesne incumbrancer, the real representatives of such deceased incumbrancer are not necessary parties, *Taylor v. Stead*, 1 Ch. Ch. R. 74; *Grimshawe v. Parks*, 6 U. C. L. J. 142.

**445.** Any party served with a notice under Order 444 may apply to the Court at any time within fourteen days from the date of the service, to discharge the order making him a party, or to add to, vary, or set aside the decree.

security of  
reito.

necessary to make  
t. 275.

office certi-  
ficate wherein  
which affect  
the other evi-

as appear to  
in the estate  
to be served  
T hereunder

plaintiff for the fore-  
and I have been  
day of , to  
charge, lien, or in-  
to appear before  
the said estate, and  
it, and appointed  
for you to appear  
your solicitor, to

you wish to apply  
or set aside the  
thereof; and if you  
proceedings in this  
That if you fail to  
disclaiming all in-  
you had no claim

W. L., Master.

order, making them

mortgagor and the  
as of such deceased  
Ch. R. 74; Grim-

order 444 may  
days from the  
him a party,

The time of vacation is not to be reckoned in the computation of the fourteen days, Order 408.

An application to enlarge the time should be made in Chambers on notice, *per* Proudfoot, V. C., in *Crone v. Crone*, 28 Nov., 1877.

**446.** The Master, before he proceeds to hear and determine is to require an appointment to the effect set forth in schedule T to be served upon the incumbrancers made parties before the hearing, whether the bill has been taken *pro confesso* against such persons or not. (6th Feb. 1858.)

The form of appointment is:—

IN CHANCERY.

Between A. B., Plaintiff,  
and  
C. D., Defendant.

Having been directed by the decree in this cause, dated the      day of      to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in the pleadings mentioned, being (*insert description of land*), I do hereby appoint the      day of      next, at      o'clock in the noon, at my Chambers at      , to proceed with the said inquiries.

And you are hereby required to take notice:

That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., Master.

**447.** When any person, who has been duly served with a notice under Order 444, or with an appointment under Order 446, neglects to attend at the time appointed, the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the Court order otherwise, upon application duly made for that purpose. (6th Feb. 1858.)

When a person made a party in the Master's office appears and disclaims, he is not entitled to any costs, as by remaining inactive the same end will be attained as by disclaiming, *Hatt v. Park*, 6 Gr. 553.

**448.** When all parties have been duly served, the Master is to take an account of what is due to the plaintiff, and to such other incumbrancer or incumbrancers (if any), for principal money and interest; and to tax to them their costs and settle their priorities; and also to appoint a time and place, or times and places, for payment according to the practice of the Court.

Where the usual affidavit proving a mortgage debt is made, the *onus* of reducing the amount lies on the opposite party, *Warren v. Taylor*, *Ross v. Taylor*, 9 Gr. 59; *Elliott v. Hunter*, 24 Gr. 490; and see *Court v. Holland*, 8 Fr. R. 213, where the distinction between the mode of proving in the Master's office a bond or mortgage debt and a simple contract debt is considered.

Where the Master's report directing the payment of mortgage money on a day being six months from the date thereof, was not dated, and the decree gave six calendar months, a new day for payment had to be taken, *Scott v. McKeown*, 1 Ch. R. 186.

A final order cannot be granted where the Master's report is not confirmed before the day appointed for payment, *Mountain v. Porter*, 1 Ch. Ch. R. 207; *Mills v. Dixon*, 2 Ch. Ch. R. 53.

Where before the day for payment arrives, the agency at the Bank at which the money is payable is closed, a new day for payment must be appointed, and the order served, *King v. Connor*, 1 Ch. Ch. R. 274. Where the plaintiff desires to dispense with service of an order appointing a new day, on the ground of the defendant being out of the jurisdiction, the plaintiff's affidavit is not sufficient evidence to justify dispensing with service, *Adams v. Eamer*, 1 Ch. Ch. R. 260.

Where there are several incumbrancers and one day is given to them to redeem, or in default foreclosure, and the incumbrancer first in priority redeems, a new account must be taken and a new day for payment appointed, giving the others an opportunity to redeem, *Ardagh v. Wilson*, 1 Ch. Ch. R. 389.

Even after the final order of foreclosure has been obtained the defendant may apply for an extension of the time for the payment of the mortgage money. The order is not obtained as of course, and the application will be refused when the excuse for default is not satisfactory and the security is not ample, *Eyre v. Hanson*, 2 Beav. 478; *Nanny v. Edwards*, 4 Russ. 124; and the Court will not interfere to open foreclosure in aid of a defendant who has been guilty of laches and shewn no effort to save his estate, *Brothers v. Lloyd*, 2 Ch. Ch. R. 119; an affidavit by the solicitor that the defendant was exerting himself to raise the money was held insufficient, *Anon.*, 4 Gr. 61.

The enrolment of the final order is no objection to the application if made promptly, and the Court has the means of giving the mortgagee immediate payment, *Thornhill v. Manning*, 1 Sim. N. S. 451. An enlargement of the time may be given oftener than once.

On applying, the defendant should shew a reasonable excuse for non-payment on the day appointed, a probability of redeeming at the expiry of the extended time, and that the property is ample security, *Johnson v. Ashbridge*, 2 Ch. Ch. R. 251; and when the plaintiff can be placed in the same position he occupied before the default, and recompensed for any damage he may have suffered, and when there appears a prospect of the amount of the mortgage money being paid within the period asked for, the Court will not refuse to open the foreclosure, *Waddell v. McColl*, 2 Ch. Ch. R. 62; and see *G. v. V.* 2 Ch. Ch. R. 33; at one period the terms on which an application was granted appear to have been to require payment of the interest and costs by an early day, and to extend for six months the period for payment of the principal money, *Wharton v. Cradock*, 1 Keen, 269; *Brewen v. Austin*, 2 Keen, 211; *Geldard v. Hornby*, 1 Ha. 251; and this rule seems still followed where the security is not ample, *Fisher on Mortgages* (3rd ed.) 1053.

The course more generally followed now is to extend the time upon payment of the costs of the application, charging defendant with interest on the gross amount reported due, *Halford v. Yate*, 1 K. & J. 677; *Whitfield v. Roberts*, 7 Jur. N. S. 1268; and see *Howard v. Macara*, 1 Ch. Ch. R. 27.

Where it was shewn that the defendant was hindered in selling or raising money on the lands in consequence of an advertisement signed and circulated by the plaintiff's solicitor, the time for payment was extended without costs, *Gilmour v. Meyers*, 2 Ch. Ch. R. 179.

**449.** The Master's report must state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided, the names of such as have made default, and must settle the priorities, etc., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate. (6th Feb. 1858; Ord. 6.)

**450.** In case of payment by any party according to the report, the party to whom payment is made is to convey the

premises, free and clear of all incumbrances, done by him, and deliver up all deeds and writings in his custody or power, relating thereto, upon oath, to the party making the payment, or to whom he may appoint.

**451.** In default of payment being made according to the report, the plaintiff is to be entitled, on an *ex parte* application, to a final order of foreclosure against the party making default.

Where co-mortgagees are made co-plaintiffs in a foreclosure suit, the affidavit as to non-payment, on which to obtain the final order of foreclosure, should be made by all of them, *Annis v. Wilson*, 1 Ch. Ch. R. 217; one of the mortgagees being abroad, the affidavit of non-payment made by the other was held sufficient, *Layard v. Maud*, W. N. (1869) 258; *Counter v. Wylde*, 1 Gr. 538; and the affidavit by the plaintiff should shew that he has not been in possession of the mortgaged property, nor in receipt of the rents and profits, *Scott v. McDonnell*, 1 Ch. Ch. R. 193; the affidavit should be made after the day the money is due, *Blong v. Kennedy*, 2 Ch. Ch. R. 453.

On an application for a final order of foreclosure, where the affidavit of non-payment is made by the plaintiff's agent, it should state that he is authorized to receive the money, *Powers v. Merriman*, 1 Ch. Ch. R. 225; but the authority of the agent need not be produced, it is sufficient for him to swear that he is the duly authorized agent, *Radcliffe v. Duffy*, 1 Ch. Ch. R. 302; the affidavit must shew where the custody of the mortgage has been, *Rae v. Shaw*, 1 Ch. Ch. R. 209. Where the affidavit as to non-payment is made by the plaintiff's solicitor, it must be shewn that the plaintiff has no other agent within the jurisdiction authorized to receive the money, *Taylor v. Cuthbert*, 1 Ch. Ch. R. 240. On an application by a company for a final order, the affidavit of the officer of the company as to non-payment, should shew that he is the proper officer to receive the money, *Western Assurance Co. v. Capreol*, 1 Ch. Ch. R. 227.

The certificate under Order 257 from the Bank officer should shew that the money has not been paid before, as well as on or since the day appointed, *Farrell v. Stokes*, 1 Ch. Ch. R. 201; the certificate should be by the cashier, or other like officer; that of the accountant as such, is not sufficient, *Campbell v. Garrett*, 1 Ch. Ch. R. 255.

Where the mortgagee is in occupation of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment, and where it appeared that a mortgagee had been charged with occupation rent to the date of the Master's report only, a final order was refused, *Pipe v. Shafer*, 1 Ch. Ch. R. 251; and where the plaintiff's affidavit shewed that he had been in occupation of the property, it was referred back to the Master to take a new account, set an occupation rent and appoint a new day for payment, although the plaintiff swore that he was in occupation merely as caretaker, and had not received any rents or profits, *Cummer v. Tomlinson*, 1 Ch. Ch. R. 235. After the day appointed for the payment of the amount due in a foreclosure suit, the plaintiff having entered into possession of the mortgaged property, he was held entitled to a final order of foreclosure without a new account being taken, *Greenshield v. Blackwood*, 1 Ch. Ch. R. 60; *Constable v. Howick*, 5 Jur. N. S. 331.

Where an order for sale was taken out *ex parte* by mistake instead of an order for foreclosure, the Court on an *ex parte* application will vacate the order for sale and grant an order for foreclosure, *McGillivray v. Cameron*, 1 Ch. Ch. R. 197.

Where two years had elapsed from the day appointed for payment, an *ex parte* application for a final order of foreclosure was refused, *Kirchoffer v. Stafford*, 2 Ch. Ch. R. 52; *Ardagh v. Orchard*, 2 U. C. L. J. N. S. 303.

**452.** All subsequent accounts are, from time to time, to be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other party or parties



entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the decree.

**453.** If the decree directs a sale instead of a foreclosure on default in payment, then on default being made, and an order for sale obtained, the premises are to be sold, with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ about the same; and the purchaser is to pay his purchase money into Court, to the credit of the cause, subject to the further order of the Court.

Where a sale is ordered the Master may cause the property, or a competent part thereof, to be sold either by public auction, private contract, or tender, or part by one mode and part by another, as he may think best for the interest of all parties, and he may fix an upset price or reserved bidding, but such price or bidding must be so fixed at the meeting held by him for the purpose of settling the advertisement and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale, Jud. Act, O. XXXVII., r. 7. For proceedings and practice under an order for sale, see Order 374, *et seq.* As to settling conveyances, see notes to Order 226.

Where a decree directed a sale, but omitted to provide that in the event of the sale failing the defendant should stand foreclosed, the Court, upon petition setting forth the facts, and that the attempted sale had proved abortive, ordered defendant to pay the amount which had been found due within one month, or, in default, foreclosure, *Goodall v. Burrows*, 7 Gr. 449. Where a foreclosure is asked after an abortive sale, the mortgagor must first be allowed three months to redeem, *Girdlestone v. Gunn*, 1 Ch. Ch. R. 212. It is unnecessary to present a petition for foreclosure after an abortive sale; it is sufficient to serve a notice of motion on the mortgagor; and the extra costs of a petition and service thereof on parties other than the mortgagor will be disallowed, *Odell v. Doty*, 1 Ch. Ch. 227.

**454.** The purchase money, when so paid, is to be applied in payment of what has been found due to the plaintiff and the other incumbrancer or incumbrancers (if any), according to their priorities, together with subsequent interest, and subsequent costs, when computed and taxed by the Master.

**455.** In the event of the purchase money being insufficient to pay what has been found due to the plaintiff for principal, interest and costs, subsequent interest and subsequent costs, the plaintiff is to be entitled, (where the mortgagor is a defendant and such relief is prayed by the bill,) to an order *ex parte* for the payment of the deficiency.

As to the order for the payment of any deficiency, see *Cochenour v. Bullock*, 12 Grant, 138; *Forbes v. Adamson*, 1 Ch. Ch. R. 117.

A vendor who has conveyed land without receiving the purchase money is entitled against the vendee to a decree for the sale of the property, and to a personal order for payment of any deficiency, *Sanderson v. Burdett*, 16 Gr. 119; S. C. on appeal, 18 Gr. 417, *Skelly v. Skelly*, 18. Gr. 495.

**456.** An incumbrancer made a party in the Master's office, and entitled to, and desiring a sale of the mortgaged premises,



is to make the necessary deposit therefor before the Master's report is settled, whereupon the Registrar is to issue an order on præcipe, directing a sale of the mortgaged premises instead of a foreclosure, and thereupon the Master is to compute subsequent interest, and appoint a time and place, or times and places, for payment; and all the subsequent proceedings are to be taken and had as if the decree had been in the first instance a decree for sale.

As to the deposit on desiring a sale, see Ord. 429, and notes.

**457.** Where the state of the account ascertained by an order, or by the report of the Master, is changed by payment of money, by receipt of rents and profits, by occupation, rent or otherwise, before the final order for foreclosure or sale is obtained, the plaintiff, or other party to whom the mortgage money is payable, may give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice. (29th June, 1861.)

The notice of credit must be given before the day for payment arrives, *Knottinger v. Barber*, 1 Ch. Ch. R. 258.

Where after the day appointed for payment the plaintiff entered into possession of the mortgaged premises he was held entitled to a final order of foreclosure without a new account being taken, *Greenshields v. Blackwood*, 1 Ch. Ch. R. 60; *Portman v. Smith*, 2 L. J. N. S. 167.

**458.** Upon the final order for foreclosure or sale being applied for, if the Judge thinks the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the Judge directs notice to be given. (29th June, 1861.)

**459.** The party to whom the mortgage money is payable, may apply in Chambers for a reference to a Master, or for an appointment, to fix such sums respectively; and in the latter case either upon notice, or *ex parte*, as the Judge thinks fit; and the order to be made thereupon is to be served, or service thereof dispensed with, as the Judge directs. (29th June, 1861.)

**460.** The party to whom such notice is given may apply in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid, instead of the amounts mentioned in such notice; or for a reference to a Master for the like purpose; and in case the Judge thinks a reference to a

Master proper, the same may be made *ex parte* unless the Judge otherwise directs. (29th June, 1861.)

**461.** Where a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property, for default in the payment of interest, or of an instalment of the principal, a defendant may move to dismiss the bill upon paying into Court the amount then due for principal, interest, and costs. (3rd June, 1853; Ord. 32, s. 5.)

Upon default in payment of any instalment of principal or interest, the mortgagee has a right to call in the whole amount secured by the mortgage, *Sparks v. Redhead*, 3 Gr. 311; *Cameron v. McRae*, *Id.*; but a mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot file a bill to foreclose that mortgage with the others, *Thibodo v. Collar*, 1. Gr. 147.

When a defendant moves to stay proceedings under this section, the interest is to be calculated up to the last gale day, and not up to the time of making the application, *Strachan v. Murney*, 6 Gr. 378.

A mortgagee is not obliged to accept payment of the whole principal and interest on a mortgage on which only a certain amount is over due, on a bill filed for foreclosure, *Green v. Adams*, 2 Ch. Ch. R. 134.

Although in terms this Order only refers to a suit for foreclosure instituted against a mortgagor or owner of the equity of redemption, the same relief will be given in a suit for redemption instituted by the mortgagor or those claiming under him, *Moore v. Merritt*, 6 Gr. 550; *McLarn v. Miller*, 20 Gr. 637; *Dornyn v. Fralick*, 21 Gr. 193; but see *Tyler v. Hinton*, 3 App. R. 53.

**462.** Where a suit has been instituted for the purpose and under the circumstances specified in the last Order, a defendant may move to stay the proceedings in the suit, after decree, but before sale or final foreclosure, upon paying into Court the amount then due for principal, interest, and costs. (3rd June, 1852; Ord. 32, s. 6.)

**463.** Where an application is made to stay the proceedings under Order 462, the decree may afterwards be enforced, by order of the Court, upon subsequent default in the payment of a further instalment of the principal, or of the interest. (3rd June, 1852; Ord. 32, s. 6.)

After payment under Order 462 of what is due, it is irregular to take any further proceedings in the cause until another instalment falls due, *Carrol v. Hopkins*, 4 Grant, 431; as to the period up to which interest is to be computed, see note to Order 461.

Where a stay of proceedings has been ordered and default is made in payment of another instalment of interest, an order will be granted directing payment of the whole sum secured, with liberty to the defendant to pay the sum now actually payable, and directing a stay of proceedings on such payment being made, *Strachan v. Devlin*, 1 Ch. Ch. R. 8.

**464.** In a suit for foreclosure or for redemption, the mortgagor or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered

to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be. (29th June, 1861.)

This section refers only to mortgage cases, and does not apply where the bill in a suit for specific performance is dismissed at the hearing, *Mavery v. Montgomery*, 1 Ch. Ch. R. 21.

The Court will not make such an order against the tenants of the mortgagor or owner of the equity of redemption, although such tenancy may have begun after the mortgage was made, *Bank of Montreal v. Ketchum*, 1 Ch. Ch. R. 117; an order for delivery of possession is only made against persons not parties, when they acquired possession *pendente lite* from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of receivers and sequestrators, *Bank of Upper Canada v. Wallace*, 13 Gr. 184.

An order for delivery of possession will not be granted *ex parte*, but notice of motion must be served; even though the bill has been taken *pro confesso*; *Hodkinson v. French*, 1 Ch. Ch. R. 201.

After the final order for foreclosure an order for delivery of possession will be granted, although not asked for when the final order was obtained, *Lazier v. Ranney*, 6 Gr. 323; and see *Mason v. Seney*, 2 Ch. Ch. R. 30.

On moving to commit for contempt in not obeying such an order, it must be shewn that possession was demanded, *Nevieux v. Labadie*, 1 Ch. Ch. R. 13.

Where more than three years have elapsed between the final order, and the application for delivery of possession, an affidavit is required to shew the circumstances of the possession and the final order, and that the defendant has never relinquished possession, *Irving v. Munn*, 1 Ch. Ch. R. 240.

The fact that an ejectment suit has been brought by the mortgagee, and is pending, is no bar to obtaining the usual order for possession, after final order for foreclosure, but in such a case the order will be granted only on the terms of discontinuing the action at law, and paying the costs of it, *Moffatt v. White*, 1 Ch. Ch. R. 227.

Since the Administration of Justice Act, R. S. O., c. 49, the plaintiff may by his bill pray for immediate possession of the mortgaged premises. As to the indorsement where such relief is prayed, see Ord. 647.

**465.** Where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs both at law and in equity, unless the Court sees fit to order otherwise. (6th Feb. 1858; Ord. 7.)

Where a mortgagee proceeds both at law and in equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the Chancery costs instead of those at law, if the defendant objects thereto, *Weir v. Taylor*, 1 Ch. Ch. R. 371; and see *Rudd v. Rowe*, 22 L. T. N. S. 785.

**466.** In a redemption suit, if the plaintiff does not redeem the defendants, or such of them as he is ordered to redeem, the bill need not be dismissed; but where there are other defendants, in lieu of the bill being dismissed the plaintiff may be declared foreclosed, and directions may be given, either by the decree or by subsequent orders, as to the relative rights and liabilities of the defendants as amongst themselves; and such proceedings are in such case to be thereupon had, and with the same effect, as in a foreclosure suit. (6th Feb. 1865; Ord. 24.)

See, as to proceedings in such a suit, Jud. Act, O. XXXVII, rr. 9, 10.

## PROCEEDINGS IN A MORTGAGE SUIT.

## PARTIES.

As a general rule all persons who have an interest either in the right of redemption or in the security, are necessary parties to foreclosure and redemption actions, *Jones on Mortgages*, II. 413; *Fisher on Mortgages*, s. 1427.

## IN FORECLOSURE SUITS.

## 1.—Parties plaintiff.

If the mortgagee is only party in interest, he is, of course, the only plaintiff; but if he has assigned his whole interest in the mortgage, he should not be made a party to the suit, *Fisher*, s. 1457. Upon the death of the mortgagee the mortgage security belongs in equity to his personal representatives, who are proper parties to bring a suit for foreclosure—not the heirs or parties beneficially entitled under his will, *Fisher*, s. 1466; *Lawrence Humphreys*, 11 Gr. 209; *Grimshaw v. Parks*, 6 L. J. O. S. 142.

## 2.—Parties defendant.

*Mortgagor*.—The mortgagor or the owner for the time being of the whole or any share of the equity of redemption must be present in every suit, otherwise his right to redemption would remain open. He need not, however, be joined in a suit between mortgagee and derivative sub-mortgagee for redemption or foreclosure, *Fisher*, s. 1428.

The mortgagor, after he has conveyed the whole of the premises mortgaged, is not a necessary party to the suit, unless a judgment is sought against him on the covenant or an order for payment of any deficiency upon a sale, *Jones on Mortgages*, II. 404. The holder of the equity of redemption by purchase from mortgagor is of course a necessary party. The assignee in insolvency of a mortgagor is the proper party to suits respecting his interest in the mortgaged premises, and the mortgagor is not a necessary party, *Fisher*, 1433; *Torrance v. Winterbottom*, 2 Gr. 487.

A *puisne* mortgagee may file a bill to foreclose subsequent incumbrancers to himself and the mortgagor without making the prior mortgagees parties (their rights will not be affected by the suit), but he cannot file a bill to redeem those prior to himself without making all subsequent parties, *Seton on Decrees*, 1085. Where the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause, *G. O. Chy. No. 439*.

*Wife*.—Prior to the recent Statute, 42 Vict. (Ont.) cap. 22, it was held that a married woman was not in respect of dower a necessary party to a bill for the foreclosure of a mortgage in which she had joined to bar dower, *Davidson v. Hayes*, 6 P. R. 27. Since that Act came into force it has been held that she is not improperly made a party to such a bill, *Building & Loan Association v. Carawell*, 8 Pr. R. 73. It has been held by the Court of Appeal that sec. 1 of this Act only applies to mortgages made after its coming into force, *Re Martindale v. Clarkson*, *Can. L. T.*, vol. 1, p. 44.

*Mortgagor dead*.—If mortgagor has died, being still the owner of the estate and intestate, his widow and heirs are necessary parties to bills both to foreclose and to sell. If the suit is for a sale, the personal representative of the mortgagor is a necessary party if a judgment on the covenant of the deceased mortgagor or an order for deficiency upon a sale is prayed for, *Fisher*, s. 1448, but not where all relief against the personal estate is waived, or where the debt is for any reason not payable out of the personal assets. The personal representative of the mortgagor is not generally a necessary party to a suit for foreclosure simply or for redemption of a mortgage in fee, for he is neither interested in the account nor entitled to redeem, *Fisher*, s. 1446.

Where the mortgagor has died testate, the devisee, whether in trust or beneficially, of the mortgagor is a necessary party in respect of so much of the equity of redemption as has been given him.

*Derivative Mortgage*.—To a suit by a derivative mortgagee to foreclose the mortgagor, the original mortgagee, or in case of his death his representative, must

be a party, being interested in taking the account. But the original mortgagee may redeem the derivative mortgagee, and the latter may foreclose the original mortgage without making the original mortgagor a party, *Seton*, 1154.

*Tenant*.—A tenant of the mortgagor is a proper party to a bill for foreclosure that he may have an opportunity to redeem or in case of default may be ordered to deliver up possession, *Canada P. L. & S. Soc. v. Macdonell*, 22 Gr. 161.

*Sureties*.—By G. O. Chy., No. 62, where plaintiff has a joint and several demand against several parties, either as principals or sureties, he may proceed against one or more of the persons severally reliable. But where there is only one principal and one surety, both must be parties to a bill for foreclosure or sale if any relief is sought against the surety, *Seidler v. Shepherd*, 12 Gr., 456; *Merchants' Bank v. Sparks*, 28 Gr., 110. A surety for payment of mortgage debt may be made a party to a suit for sale, and an order for payment of any deficiency after such sale made against him, G. O. Chy., No. 427.

*Insolvent Mortgagor*.—A *fi. fa.* cannot be obtained against an insolvent mortgagor whose estate has, after he has obtained a discharge, been reconveyed to him; although it may be that the mortgagee would be entitled to call upon the mortgagor to release his equity of redemption, *Smith v. Elliott*, 25 Gr. 598.

#### IN SUITS FOR REDEMPTION.

As a general rule the mortgagor and all persons having any interest in the equity of redemption may redeem.

##### 1.—Parties Plaintiff.

Any one who has a right to redeem is a proper party plaintiff. Upon the death of the mortgagor or other owner of the equity of redemption, his heir or devisee should bring the suit to redeem, *Jones*, 1098, 99. If the mortgage is for a term of years only, the personal representatives of mortgagor only need be made parties plaintiff.

##### 2.—Parties Defendant.

If there be no outstanding interest under the mortgagee, he is the only necessary party. If he be dead, the heirs at law or devisees in whom the estate is vested must be made parties, as also the personal representative, as being entitled to recover the money paid, *Jones*, 1100.

The person who is the legal holder of the mortgage at the time of the action brought, whether as mortgagee or assignee of the mortgage is a necessary party. Where a mortgagee has absolutely assigned his whole interest in the mortgage, he should not be made a party to an ordinary suit for redemption, *Fisher*, s. 1457, but if he has assigned a part interest only, he is still a necessary party, as also is his assignee, *Jones*, s. 1100.

Generally no suit can be brought against the mortgagee in respect of the mortgaged estate, unless there be an offer to redeem him made by a person entitled to do so, *Fisher*, s. 1455. A subsequent mortgagee may redeem a prior mortgagee, but must bring the mortgage before the Court in order to do so. Where a sale or foreclosure is asked for, subject to a prior mortgage, the prior mortgagee is not to be made a party, either by bill or in the Master's office, except under special circumstances to be alleged in the bill.

#### PRACTICE AND PROCEDURE.

*Various Reliefs*.—Since the passing of the Administration of Justice Act, R. S. O., cap. 49, a mortgagee need not bring actions of ejectment and on the covenant at law, but the Court will (in addition to the ordinary remedies given by the Court of Chancery in mortgage cases) grant an order for immediate payment on which writs of *fi. facias* can at once issue, and also an order for immediate possession to be given to the mortgagee, he being charged with an occupation rent during the time limited for redemption, *Imperial L. & I. Co. v. Boulton*, 22 Gr. 121.

An order for payment cannot be made, unless defendant is personally liable for the debt, *Christie v. Dowker*, 10 Gr. 199.

As to joinder of causes of action and parties under the Judicature Act, see Orders XII. & XIII.

Where a mortgagee filed a bill in Chancery for sale and at same time proceeded in ejectment against defendant, the action at law was stayed by order in that action on the ground that all remedies could be obtained in the Chancery suit, *Hay v. McArthur*, 8 P.R. 321. Where a mortgagee proceeded on same day to foreclose property of mortgagor and his sureties, by several bills upon their respective mortgages, and to sue at law in different actions, the same parties, on notes held by the plaintiff to which the mortgages were collateral, it was held that one suit only in Equity was necessary, as all parties might have been brought before the Court therein, *Merchants' Bank v. Sparks*, 28 Gr. 108.

*Interest.*—By R. S. O., c. 108, s. 17, interest more than six years overdue ceases to be a charge on the land mortgaged, but by R. S. O., c. 61, arrears of interest up to twenty years can be recovered in an action on the covenant. In order to avoid circuity of action the mortgagee is allowed, in proceeding upon his mortgage in Chancery, to tack as against the heirs of the deceased mortgagor the whole arrears of interest recoverable on the covenant, *Leith & Smith's Blackstone*, p. 211. Where mortgagor is seeking to redeem and there are no incumbrancers subsequent to the mortgage, the mortgagee is entitled to all arrears of interest that are recoverable on the covenant, *Howren v. Bradburn*, 22 Gr. 96.

*Right to call in whole principal.*—Upon default in payment of any instalment of principal or interest, the mortgagee has a right to call in the whole amount secured by the mortgage, *Cameron v. McRae*, 3 Gr. 311.

But where, by express agreement in the mortgage, the right to call in the principal money is deferred during a certain period, no default in payment of interest during that time will enable mortgagee to file a bill to foreclose, *Parker v. Vinegrowers*, 23 Gr. 179. *Seem*, the only remedy in respect of overdue interest in such cases is by suing on the covenant, *ib.*

Where a bill is filed for foreclosure for default in payment of interest or of an instalment of principal, a defendant may move to dismiss the bill upon paying into Court amount then due, for principal, interest and costs, G. O. Chy., No. 461, and this may be done even after decree, but before sale or final foreclosure, G. O. Chy., No. 462. Upon a subsequent default in payment of a further instalment of principal or interest, the decree may afterwards be enforced by order of the Court, G. O. Chy., No. 463.

These orders apply notwithstanding that defendant has covenanted that upon default in payment of any part of the interest, principal should forthwith, at option of mortgagee, become payable, *Gemmill v. Burn*, 7 Fr. R. 381.

But a mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due and a bill to foreclose which is filed, *Green v. Adams*, 2 Ch. Ch. R. 135.

In proceedings under G. O. 461, the interest is calculated up to the last gale day only, *Strachan v. Murney*, 6 Gr. 378.

*Proceedings in action.*—Under the Judicature Act, actions in respect of mortgages will be commenced by writ, O. I., r. I.

*Indorsements.*—By O. III., r. 7, the indorsements are to be as follows:—(see Forms, No. 9).

*By Mortgagee for sale and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the \_\_\_\_\_ day of \_\_\_\_\_ made between \_\_\_\_\_ [or by deposit of title deeds], and that the mortgage may be enforced by sale, and payment to the plaintiff by the defendant personally of any balance. *(If order for immediate payment is wanted add)* And take notice further, that the plaintiff claims to be entitled forthwith to execution against the goods and lands of you *(naming the defendant against whom this order is claimed)* to recover payment of amount due by you.

*(If order for immediate possession is wanted add)* And take notice further, that the plaintiff claims to be entitled to an order for the immediate delivery of the mortgaged premises to him.

*By Mortgagee for foreclosure and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the \_\_\_\_\_ day of \_\_\_\_\_, made between \_\_\_\_\_ *(or by deposit of title deeds)*, and that the mortgage may be enforced by foreclosure.



(If order for immediate payment is wanted add) And take notice further that the plaintiff claims to be entitled forthwith to execution against the goods and lands of you (naming the defendant against whom this order claimed) to recover payment of the amount due by you.

(If order for immediate possession is wanted add) And take notice further that the plaintiff claims to be entitled to the immediate possession of the mortgaged premises.

(At the end of the indorsement add) If you desire a sale of the mortgaged premises instead of a foreclosure, and do not intend to defend the action, you must within the time allowed for appearance, file in the office within named, a notice in writing, signed by yourself or your solicitor, to the following effect:—"I desire a sale of the mortgaged premises in the plaintiff's writ of summons mentioned, or a competent part thereof, instead of a foreclosure," and you must deposit the sum of \$80 to meet the expenses of such sale.

#### By Mortgagor for Redemption.

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [parties], and to redeem the property comprised therein.

On taking the account in a mortgage suit, no more can be found due than the amount claimed by the indorsement, *Boyd v. Wilson*, 1 Ch. Ch. R. 258.

Premiums of insurance paid by plaintiff, after bill served, being claimed by him, notice of settling decree was directed to be served, *English & S. Co. v. Gray*, 8 Pr. R. 190.

The indorsement should specify distinctly whether a sale, or a foreclosure desired, *Drewry v. O'Neil*, 2 Ch. Ch. R. 204.

If indorsement on bill served does not mention mortgagee's intention to apply for a personal order, such relief will not be granted, on a hearing *pro confesso* even though prayed for in bill, *Armour v. Usborne*, 13 L. J. N. S. 1.

*Dispute note.*—Where a defendant merely questions the amount claimed by plaintiff, it was the practice to file a memorandum in writing signed by him or his solicitor, to the following effect. "I dispute the amount claimed for the plaintiff in this cause." In this case four days' notice at least of time for settling the amount must be served upon the defendant. Where the defendant desires to shew that whole of plaintiff's claim is barred by the Statute of Limitations he must set up that defence by answer and cannot raise it under a dispute note, *Cattanach v. Urquhart*, 6 Pr. R. 28; see also *Grand Junction v. Bickford*, 1 Sup. C. R. 696.

But where the statute applies only to a portion of the claim, that point can be raised by filing a dispute note, *Wright v. Morgan*, 1 App. R. 613; 1 Sup. C. R. 696.

There is no provision in the Judicature Act for the filing of a disputing note, as under the former practice, and that part of the indorsement which formerly notified the defendant that he might file such a document has been omitted from the forms given by the Act.

*Decree or Judgment.*—Where the defendant answers the bill admitting the execution of the mortgage and other facts, if any, entitling plaintiff to a decree, or where defendant disclaims any interest in the mortgaged premises or does not put in any answer, the plaintiff can obtain from Registrar or Deputy-Registrar (where bill filed in an outer county) such a decree as would, under the practice of the Court have been made upon a hearing *pro confesso*, G. O. Chy. No. 435. This applies both to redemption and foreclosure suits, and to cases where the defendant has been served by publication or otherwise, or is a corporation. But where the bill has not been personally served, the claim of the plaintiff must be duly verified by affidavit, G. O. Chy. Nos. 646, 648. Since the passing of this order the Registrar has power to issue any decree on *precipe* in mortgage cases which the Court would previously to the order have made on a hearing *pro confesso*, *Kirkpatrick v. Powell*, 22 Gr. 94. But where an injunction is desired, cause must be brought on for hearing, *King v. Freeman*, 1. Ch. Ch. R. 350.

Where any of the defendants are infants, and no defence is set up in their answer, the plaintiff is to apply in Chambers upon notice to the guardian for a decree, upon proof by affidavits of the due execution of the mortgage and other necessary facts, G. O. Chy. No. 434.



In decrees or final orders for foreclosure against infants, a day to shew cause after attaining twenty-one must be reserved to them, even though a sale has taken place which has proved abortive, *Mair v. Kerr*, 2 Gr. 223; *London & Canadian v. Everett*, 17 U. C. L. J. 110.

Order IX., rr. 10 & 11 of the Judicature rules now provide as follows:—

10. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure or sale or redemption, or where the action is for the administration of an estate, or for a partition, the plaintiff shall be entitled to a judgment or order on *præcipe* to the Registrar, Deputy-Registrar, Local Registrar, or Clerk or Deputy-Clerk of the Crown and Pleas, as the case may be.

11. Where the action is for the foreclosure or redemption of a mortgage, or sale of mortgaged premises, if the plaintiff is not entitled to a judgment or order on *præcipe*, or would not according to the practice of the Court of Chancery be entitled on *præcipe* to such a judgment or order as he desires, he shall be entitled to the proper judgment or order on notice or otherwise, according to the practice of the Court of Chancery where a cause is heard on an order to take the bill *pro confesso* or otherwise. See G. O. Chy., Nos. 113 *et seq.*, 432-434.

*Reference or account by Decree.*—Where there are no encumbrances subsequent to that of the plaintiff, the account is taken and day fixed for redemption by the decree. If plaintiff takes a reference to the Master to inquire as to encumbrancers, it is at his peril as to costs in case there are no encumbrances, *Hamilton v. Howard*, 4 Gr. 581.

Where there are subsequent encumbrancers, a reference is necessary to the Master to inquire as to them.

The decree will be drawn up upon production of an office copy of the bill and an affidavit of service thereof, shewing same to have been duly indorsed with the proper notice, G. O. Chy. No. 436.

For forms of judgments on *præcipe* under the Judicature Act, see Forms, Nos. 168-170.

*Immediate Sale.*—Where it appeared to be for the benefit of the infants interested, and plaintiffs, who were the only encumbrancers, consented, an immediate sale was ordered at instance of guardian of the infants without receiving consent of the adult mortgagor, *Cayley v. Colbert*, 2 Ch. Ch. R. 431.

And under special circumstances a sale will be ordered without giving usual time to redeem, even against the infant heirs of the mortgagor, *Swift v. Minter*, 27 Gr. 217.

In a suit to enforce payment of a mortgage, if the mortgagor consents to an immediate sale, it is not necessary that subsequent encumbrancers should give their consent thereto, *Township of Hamilton v. Stevenson*, 25 Gr. 193.

But in *Ewart v. Hutton* (not reported), V. C. Blake held that the consent of subsequent encumbrancers was necessary.

An order for an immediate sale will not be made in Chambers where the Master, pursuant to a decree made in Court, has fixed a day for payment, and it has not arrived. The motion must be made to the Court, *Buell v. Fisher*, 6 Pr. R. 51.

*Master's Office.*—The plaintiff is to bring into the Master's office certificates from the Registrar and Sheriff of the county wherein the lands lie, setting forth all the encumbrances thereon, G. O. Chy. No. 443. O. XLIX., r. 8 of the Judicature Rules is as follows:—

Upon a reference under a judgment for redemption, the Master is, without any special direction, to take an account of what is due to the defendant for principal money and interest, and is to tax to him his costs, and also appoint a time and place or times and places for payment according to the present practice of the Court in that behalf.

The Master is to direct all persons appearing to have any lien charge or encumbrance upon the estate in question, to be made parties to the cause, and to be served with a notice in the following form—commonly called notice T. The form is given in notes to G. O. Chy. No. 444.

Persons so added are parties from date of Master's order making them so, *Sterling v. Campbell*, 1 Ch. Ch. R. 147.

Notice of proceedings in Master's office should be served upon a mortgagor against whom bill has been taken *pro confesso* where the plaintiff desires to prove a claim in addition to that alleged in the bill, *McCormick v. McCormick*, 6 Pr. R. 208.

day to shew cause  
th a sale has taken  
don & Canadian v.

vide as follows:—  
plaintiff claims fore-  
ministration of an  
gment or order on  
Clerk or Deputy-

mortgage, or sale  
gment or order on  
lancery be entitled  
be entitled to the  
the practice of the  
the bill *pro confesso*

ances subsequent  
redemption by the  
to encumbrancers,  
Milton v. Howard,

necessary to the

y of the bill and an  
indorsed with the

t, see Forms, Nos.

the infants inter-  
an immediate sale  
ing consent of the

hout giving usual  
Swift v. Minter, 27

consents to an im-  
should give their

that the consent of

where the Master,  
nt, and it has not  
er, 6 Pr. R. 51.

ce certificates from  
etting forth all the  
e Judicature Rules

ter is, without any  
ndant for principal  
nt a time and place  
of the Court in

n charge or encum-  
se, and to be served  
The form is given

ing them so, Ster-

upon a mortgagor  
desires to prove a  
rnick, 6 Pr. R. 208.

And as a general rule in proceeding upon a decree *pro confesso* the defendant should have notice, though it may not be necessary to serve him with all warrants issued by the Master, *Robinson v. Whitcomb*, 20 Gr. 415.

Any party served with notice T may apply to the Court at any time within fourteen days from the date of the service to discharge the order making him a party, or to add to, vary, or set aside the decree, G. O. Chy. No. 445.

The application to the Court should be brought on for hearing within the fourteen days, *McIlroy v. Hawke*, 3 Ch. Ch. R. 66; *Wright v. Wright*, V.-C. B., 29th March, 1881.

Motions or petitions to add to, vary, or set aside a decree, must be set down with Clerk of Records and Writs, at least seven days before day of hearing, and seven days' notice of the hearing is be given to all parties entitled to notice, G. O. Chy., No. 418.

Motions by a person made a party in the Master's office, to add to, vary, or set aside a decree, must be set down under the provisions of this order, *Wright v. Wright*, *supra*.

An encumbrancer claiming to be prior to the plaintiff, can either move to discharge the Master's order making him a party or appeal from the report of the Master as to his priority, *McDonald v. Rodger*, 9 Gr. 75.

By O. XLVII., r. 1, of the Judicature Orders, all applications authorized "by these rules" to be made to the Court or a Judge shall be by motion.

In determining the rights of the parties in the Master's office, an instrument can be impeached for fraud, where the question legitimately emerges during a reference; for this purpose a statement should be filed setting out the grounds upon which it is impeached, *Darling v. Darling*, 15 U. C. L. J. 113.

*Adding parties interested in equity of redemption.*—Where it appears conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's office, by reason of the parties so interested being numerous or otherwise, the Court may direct that parties so interested be made parties in the Master's office, upon such terms as to the Court seems fit: such order to be made only where one or more parties interested in the equity of redemption are already before the Court, G. O. Chy., No. 438.

The application should be made by motion in Chambers, and notice should be served on the owners of the equity of redemption already before the Court, but not on those proposed to be added, *Fenner v. Canniff*, 1 Ch. Ch. R. 351; *Harrison v. Grier*, 2 Ch. Ch. R. 440.

An application to set aside an order made in Chambers, under Order 438, should be made to the Court upon petition, *Tice v. Meyers*, 3 U. C. L. J. N. S. 102. Chy. G. O. 438, only applies to a case where the equity of redemption has been represented in the proceedings in the cause and does not apply to a case where the party sought to be added is entitled to the whole equity of redemption, *Leslie v. Hambleton*, V.-C. Blake, 4th April, 1881. In this case application was made, on notice to some of the defendants, to add as a party, under G. O. 438, a party claiming to own the equity of redemption under a deed dated before bill filed, but not registered until after final order of sale was obtained. The defendants before the Court were the widow and children of the deceased mortgagor, who was alleged to have made the deed in question. This deed, however, was supposed to be a forgery. An order was made adding the grantee, under the alleged deed, as a party, and in the event of the order not being discharged, directing an inquiry before the Master as to the parties entitled to the equity of redemption.

*Accounts.*—Every claim sought to be proved should be supported by the affidavit of the person entitled to receive the money, the mortgage should be produced, and the affidavit should state distinctly the amount claimed to be due.

Where the claimant resides out of the jurisdiction an affidavit of his duly authorized agent, who has the custody of the mortgage deed, will be received.

Where the decree is in the usual form in mortgage cases, and the claimant produces the mortgage deed and files the usual affidavit proving his claim, the claim is *prima facie* proven, and the onus of reducing the amount rests upon the party resisting it, *Elliott v. Hunter*, 24 Gr. 430; *Court v. Holland*, 8 Pr. R. 213.

Where the mortgage in respect of which a claim is filed has been assigned, the

oath of the assignee proving the mortgage account, is sufficient *prima facie* evidence of the state of such account, and no affidavit is necessary from the mortgagees or any intermediate assignee denying any payment, unless the party proceeding to redeem denies by oath the correctness of such statement of account, R. S. O., c. 99, s. 4.

See O. XXXVII., r. 8, of the Judicature Act Rules, quoted *supra*.

In taking the accounts, the Master has power :—

- (a) To take them with rests or otherwise.
- (b) To take an account of rents and profits received, or which but for wilful neglect and default might have been received.
- (c) To set occupation rent.
- (d) To take into account necessary repairs and costs and other expenses properly incurred.
- (e) To make all just allowances.

When the rate of interest is fixed by the instrument, till principal paid, interest is allowed at the rate reserved, up to the time fixed, but there is no contract implied for a continuance of that rate after that date, *St. John v. Rykert*, 4 App. 226; G. O., Chy. No. 220.

*Prima facie* the rate reserved by the mortgage, if not excessive, will be adopted and the onus is upon the party resisting this to shew that a lower rate should be allowed, *Simonton v. Graham*, 17 U. C. L. J. 169.

Interest upon interest in arrear or upon fines for non-payment of principal and interest, is not allowed by the Court, unless there is a contract for it, *Fisher*, s. 982.

*Rests*.—The usual mode of taking accounts against a mortgagee in possession, is to set the total amount of rents and profits received by or found to be chargeable to him against the whole amount due upon the mortgage debt, but where the receipts of the mortgage are more than sufficient to cover the interest, the annual surplus will be considered as applicable in reduction of the principal money, which is called taking the account with *rests*, *Fisher*, s. 1540. Where the interest was in arrear at time of taking possession, rests are not usually directed. Where plaintiff, a mortgagee of copyholds, entered into possession to avoid a forfeiture, and rents exceeded interest, annual rests were given, *Carter v. James*, W. N. (1881) 27. Generally, if a mortgagee be not liable to rests when he takes possession, he will not become so until the principal as well as the interest of the mortgage debt has been discharged, *Coldwell v. Hall*, 9 Gr. 110. A mortgagee taking possession for his own protection is not chargeable with rests, even though the mortgage was not in arrear, *Gordon v. Eakins*, 16 Gr. 363. But a mortgagee remaining in possession after being paid in full and resisting mortgagor's right to redeem, is chargeable, *Crippen v. Ogilvie*, 15 Gr. 568.

Under a proviso in a mortgage deed for reduction of interest on punctual payment, a mortgagee in possession through the default of the mortgagor is entitled, on the accounts being taken, to charge the mortgagor with the higher rate of interest; and also, in a proper case, with the commission paid to a receiver for collecting the rents, *Stains v. Banks*, 9 Jur. N. S. 1049; reversed on appeal, considered; *Union Bank of London v. Ingram*, L. R. 16 Chy. D. 53.

*Rents*.—Though the Court requires a mortgagee who has taken possession to be diligent in realizing the amount due, so that he may restore the estate to the mortgagor, yet he will not be responsible for any greater rent than he has *actually received* unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same; an account of *actual receipts* alone can be had unless the mortgagee has been guilty of gross default, mismanagement or fraud, *Merriam v. Cronk*, 21 Gr. 60.

But where persons who though in fact mortgagees, enter into possession of the rents and profits in another character, they are not liable to account for what they might have received, but for wilful default. It is essential that they should have been in possession as mortgagees and in no other character, *Parkinson v. Hanbury*, L. R. 2 E. & I. App. 1.

*Occupation Rents*.—A mortgagee is charged with an occupation rent, if he has been in the actual occupation of the mortgaged property, but an occupation of a part is not considered as occupation of the whole, and he will only be charged as respects the part so occupied, *Trulock v. Robey*, 15 Sim. 273.

*prima facie* evidence  
the mortgagee or  
party proceeding to  
account, R. S. O., c.

*supra*.

ch but for wilful

mer expenses prop-

incipal paid, interest  
ere is no contract  
v. Rykert, 4 App.

ve, will be adopted  
wer rate should be

at of principal and  
or it, Fisher, s. 982.

ree in possession, is  
d to be chargeable  
ebt, but where the  
interest, the annual  
incipal money, which  
the interest was in  
ed. Where plain-  
d a forfeiture, and  
mes, W. N. (1881)  
e takes possession,  
st of the mortgage  
mortgagee taking  
ests, even though  
But a mortgagee  
mortgagor's right to

st on punctual pay-  
mortgagor is entitled,  
the higher rate of  
o a receiver for col-  
on appeal, con-  
3.

en possession to be  
estate to the mort-  
n he has *actually re-*  
greater rent might  
to obtain the same;  
agee has been guilty  
21 Gr. 60.

to possession of the  
count for what they  
at they should have  
kinson v. Hanbury,

ation rent, if he has  
an occupation of a  
only be charged as

*Necessary repairs, etc.*—A mortgagee in possession will be allowed for proper and necessary repairs to the estate but not such improvements made on his own authority as are not necessary, though they may increase the value of the estate, Fisher s. 950. He has no right to lay out money in increasing the value of the property so as to make it impossible for the mortgagor to redeem. Where a mortgagee has made improvements which cannot be allowed, the rule would seem to be that he should only be charged with rent at the unimproved value of the property. For such expenditure he must get the consent of the mortgagor or must have given notice which has been acquiesced in, *Romanes v. Hern*, 22 Gr. 474.

Improvements made by a defendant under the belief that he was absolute owner are allowed for more liberally than to a mortgagee who knew himself to be such when expending his money. And where improvements are claimed beyond those a mortgagee is ordinarily entitled to make, the rule appears to be not to allow in respect of these additional improvements more than the increase of value which has been the result of the expenditure, *Carroll v. Robertson*, 15 Gr. 176.

Where mortgagors released their equity of redemption to the mortgagee who thereafter signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements made by her, she was, on a bill to redeem, held entitled to recover for all permanent and lasting improvements, though the estate might not have been increased in value to an amount equal to the sum expended thereon, *Brotherton v. Hetherington*, 23 Gr. 187.

As to improvements under a mistake of title, see R. S. O., c. 95, s. 4.

The mortgagee is entitled to interest upon moneys expended for repairs and improvements, as well as upon the mortgage money, *Paul v. Johnson*, 12 Gr. 474.

*Just Allowances.*—What are just allowances must depend upon the circumstances of each case. The following are instances:—

(1) Moneys paid for taxes.

(2) Costs necessarily or properly incurred in defending the mortgagor's title to the estate, where it has been impeached, or otherwise doing what is essential to protect the mortgagor's title, *Seton*, 1063.

(3) Of obtaining administration as a creditor of the mortgagor, *Id*.

(4) Premiums of insurance which the mortgagor has agreed to pay but has failed to pay, but not where the insurance was not effected in conformity with the provisions of the mortgage deed, *McIntosh v. Ontario Bank*, 20 Gr. 25; for the mortgagee is entitled to have the benefit of the insurance, and is not liable to account therefor to the mortgagor nor to give credit therefor upon his mortgage, *Russell v. Robertson*, 1 Ch. Ch. R. 72.

(5) In some cases a commission paid to a receiver for collecting the rents of the mortgaged property, *Union Bank of London v. Ingram*, L. R. 16 Ch. D. 53.

*Sale instead of foreclosure.*—Where the bill prays foreclosure, the mortgagor desiring a sale is to pay into Court before the time for answering expires, the sum of \$80 as a deposit for the purpose of securing the performance of such terms as the Court thinks fit to impose, G. O. Chy. No. 429, and see forms of indorsements given in Judicature Act, No. 9. No order can be made for payment by the mortgagor of an increased sum beyond the \$80, *Cruso v. Close*, 8 Pr. R. 33, which is fixed by the indorsement required by the General Orders. Upon payment in of this deposit, plaintiff may notify defendant that he elects to give conduct of sale to such defendant, and the defendant is thereupon to be entitled to a return of his deposit, G. O. Chy. Nos. 430, 431.

An encumbrancer made a party in the Master's office, desiring a sale, is to make a deposit therefor before Master's report settled, whereupon the Registrar is to issue an order on *proceipe* directing a sale instead of a foreclosure, upon which being done, all subsequent proceedings are to be taken as if decree had been originally for sale, G. O. Chy. No. 456.

An order can be got for this purpose by motion in Chambers after report confirmed and default made by all parties entitled to redeem, *Trust & Loan Co. v. Reynolds*, 2 Ch. Ch. R. 41.

If amount paid in by an encumbrancer is not sufficient, the plaintiff should move promptly to have same increased, *L. & C. v. Pulford*, 7 Pr. R. 432; it is too late to move after the advertisement for sale is settled—application should be made before order for sale acted on, *L. & C. v. Morrison*, 7 Pr. R. 450.

The money paid into Court by a second mortgagee to obtain a sale instead of a foreclosure, is applicable to indemnify the first mortgagee for his costs of an abortive attempt to sell, *Corsellis v. Patman*, L. R. 4 Eq. 156.

Where proceeds of sale were sufficient to pay plaintiff in full, but not the other encumbrancers, it was held that the deposit paid in by the defendant to procure a sale, should be applied in reduction of a second mortgagee's claim, *Gzowski v. Beaty*, 8 Pr. R. 146.

*Costs.*—Both in foreclosure and redemption suits the mortgagee is entitled to the costs of suit, and also to all costs properly incurred by him in reference to the mortgaged property for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor and to add the amount to the sum due him on his security for principal and interest, *Seton on Decrees*, 1059; *Cotterell v. Stratton*, L. R. 8 Ch. App. 295.

Apart from the question of what costs have been properly incurred by the mortgagee, his right to the costs of a foreclosure or redemption suit can only be lost by positive misconduct, of a vexatious, oppressive or fraudulent character, or by improper resistance to the right of the mortgagor to redeem. For instances, see *Seton on Decrees*, 1060; *Cornwall v. Brown*, 3 Gr. 633; and see *Jud. Act, O. L., r. 1*, and notes to *Judic. Act*, sec. 32.

In proceeding under a consent decree to redeem, the defendant being in the position of a mortgagee brought in an account claiming \$905 to be due—the Master found the balance to be only \$132—as defendant had advanced his claim honestly and under a reasonable belief that the sum claimed was justly due, he was allowed his costs of suit, *Little v. Brunker*, 28 Gr. 191.

Where in a suit to foreclose, the defendant improperly resists the claim of the plaintiff, the costs occasioned thereby will be ordered to be paid to the plaintiff, whether the defendant redeems or not, *Bryson v. Huntington*, 25 Gr. 205.

*Encumbrancer let in after foreclosure.*—Where an encumbrancer has neglected to prove his claim he may still be allowed to come in and prove notwithstanding foreclosure by report or order, *Cameron v. Wolf Island Co.*, 6 Pr. R. 91; the application is properly made in Chambers where the foreclosure was simply on ground of default; but the application will not be granted to the prejudice of other encumbrancers who have proved claims, *Becher v. Webb*, 7 Pr. R. 445.

*Times for Redemption.*—To the person entitled to the first right to redeem, it is the practice to give six months from date of report (or decree with account taken) and each of the parties entitled to a subsequent right of redemption has three months from date of further report. The practice as to time for redemption is as follows: (1) Under a decree for a sale one day six months off is to be given to the original defendants to redeem the plaintiff and all other encumbrancers who have proved claims. (2) Under a foreclosure decree a day six months from the date of report is given to the first encumbrancer to redeem the plaintiff. On default being made and a final order being obtained, the next encumbrancer is given a day three months from date of taking account to redeem plaintiff, and so on until all the encumbrancers entitled to redeem have been foreclosed, when a day should be given to the mortgagor to redeem.

When there are more encumbrancers than one, the same encumbrancers must successively redeem all prior to them or be foreclosed; and must be redeemed by, or will be entitled to foreclose all subsequent to them.

Where, some of the encumbrancers are judgment creditors, and there are no intermediate encumbrancers, the one period only should be given to them all to redeem the prior encumbrancers, it being considered that they ought not to stand in exactly the position of persons who have advanced money on a security, and also on the ground of the delay if successive periods were given them.

*Report.*—If the Master thinks it necessary, a warrant to settle the report is to be served on all parties. A Master's report should bear date the day it is actually signed, *Waddell v. McColl*, 14 Gr. 211.

All points which may be afterwards raised upon appeal are to be raised before the Master, *G. O. Chy.*, No. 248. In case an appeal is allowed on any ground not distinctly taken before the Master appellant may be ordered to pay costs of appeal, *Cummins v. Credit Valley*, 21 Gr. 165.

The form of report in the case of a suit for foreclosure by a derivative mortgage is as follows: The Master first takes an account of amount due to plaintiff and deriva-



tive mortgagor, and a day is appointed, six months from the making of the report, for the original mortgagor to pay to the plaintiff the amount due him, not exceeding the amount found due to the derivative mortgagor, and the balance (if any) after deducting the amount of the plaintiff's claim from the amount found due to the derivative mortgagor, is directed to be paid the latter. On the original mortgagor being foreclosed by a final order, the Master takes a subsequent account between the plaintiff and the derivative mortgagor, and appoints a day, three months thereafter for the latter to redeem, *Fisher's* 1676; *Leggo's Forms*, 975 (a).

*Appeal from report.*—Appeals from any decree, order, report, ruling or other determination of a Master, are to be brought on for argument before a Judge in Chambers within a month, not including vacation, of the making thereof—a seven days' notice of appeal must be given, which should set out the grounds of objection, *G. O. Chy.*, No. 642. The report must be filed before it can be appealed from, *Hayes v. Hayes*, 17 U. C. L. J. 157. Under the practice before this order it was sufficient if notice of appeal was given within fourteen days from the filing of the report, *G. O. Chy.*, No. 253, *Grimshaw v. Parks*, 6 U. C. L. J. O. S. 142.

The provisions of the Judicature Rules as to appeals are as follows:—

13. Any person affected by any order or decision of the County Judge or officer aforesaid may appeal therefrom to a Judge of the High Court at Chambers.

(a) Such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the Judge or officer aforesaid had jurisdiction only by consent.

(b) The appeal shall be by motion, on notice served within 4 days after the decision complained of; or within such further time as may be allowed by a Judge of the High Court or by the County Court Judge or officer aforesaid whose decision is complained of.

(c) The motion shall be made within 8 days after the decision has been made which is appealed against or within such further time as may be allowed as aforesaid.

(d) The appeal shall be no stay of proceedings unless so ordered by a Judge of the High Court or by the Judge or officer whose decision is complained of.

*Confirmation.*—A report must be filed fourteen days and have been made thirty days before it is confirmed, *re Eaton*, 8 Pr. R. 289.

Such reports as are merely continuing accounts taken by former reports, computing subsequent interest or which involve mere calculation, do not require confirmation, *Smith's Chy. Practice*, I. 1040, n. And see *re Yaggie*, 1 Ch. Ch. R. 168.

Where a decree ordered payment forthwith after the making of a report, it was held that report did not require to be confirmed before execution could issue under it, *Jellett v. Anderson*, 17 U. C. L. J. 24. But a report must be filed before an execution can issue under it, *Id.*

If a report may be said to be confirmed upon the expiration of the time for appeal, it will, since the Judicature Act, become confirmed, unless notice be served within four days from the decision complained of, see O. XLIX. r. 13, *ante*.

*Proceedings upon payment.*—In case of payment by any party according to the report, the party to whom payment is made is to convey the premises, free and clear of all encumbrances done by him, and deliver up all deeds and writings in his custody or power, relating thereto, upon oath, to the party making payment, or to whom he may appoint, *G. O. Chy.* No. 450.

The mortgagee is not obliged to assign the mortgage debt to the mortgagor on redemption; or to a purchaser, when the security is paid off out of the proceeds of a sale under a decree; or to convey to any other person as a mortgagee in his own place; being only bound to reconvey the estate to the owner of the equity of redemption, *Thompson v. McCarthy*, 13 U. C. L. J. N. S. 226; *Fisher*, s. 1714.

A mortgagor or other party entitled to the equity of redemption has a right to obtain at his own expense from the mortgagee a re-conveyance of the mortgaged premises, including a covenant against encumbrances. He is not obliged to accept the simple discharge of mortgage prescribed by the Statute, *McLennan v. McLean*, 27 Gr. 54.

O. XLIX., r. 12 of the Judicature Rules provides as follows:—

In a suit for foreclosure or sale upon payment by the defendant, or in a suit for redemption upon payment by the plaintiff, or payment of the amount found due, the plaintiff or defendant shall, unless the decree otherwise directs, assign and convey the mortgaged premises in question to the defendant (or plaintiff, as the case may be,) making the payment, or to whom he may appoint, free and clear of all encumbrances done by him, and deliver up all deeds and writings in his custody or power relating thereto, upon oath, and in case of a corporation the affidavit shall be made by the officer thereof having the custody of such deeds and writings.

*Default in foreclosure suits.*—In default of payment being made according to the report the plaintiff is to be entitled, on an *ex parte* application to a final order of foreclosure against the party making default, G. O. Chy. No. 451.

The material in support of this order is:—

1. Certificate of the cashier, manager or agent of the bank into which payment was to be made, shewing that money had not been paid into the bank before, as well as, on, or since, the day appointed for that purpose, G. O. Chy. No. 257; *Farrell v. Stokes*, 1 Ch. Ch. R. 201.

2. An affidavit of the execution of such certificate.

3. An affidavit of the plaintiff or party entitled to receive the money, shewing that he has not been paid, has not been in possession of the mortgaged property, nor in the receipt of the rents and profits.

Where plaintiff resides out of the jurisdiction, and the affidavit of non-payment is made by an agent, it must be shewn where the custody of the mortgage deed has been, that he is the agent duly authorized to receive the money, and that there is no other agent, *Rae v. Shaw*, 1 Ch. Ch. R. 209; *Powers v. Merrinan*, 1 Ch. Ch. R. 225; *Taylor v. Cuthbert*, 1 Ch. Ch. R. 240.

The affidavit as also the bank certificate should bear date after the day appointed for payment, *Blong v. Kennedy*, 2 Ch. Ch. R. 453.

Where plaintiff has been in possession or in receipt of rents and profits an order for a new account and appointing a new day for payment will be made though plaintiff was merely in possession as caretaker, *Cummer v. Tomlinson*, 1 Ch. Ch. R. 237.

But where plaintiff enters into possession or receives rents and profits after the day appointed for payment, he was held entitled to a final order of foreclosure without a new account being taken, *Greenshields v. Blackwood*, 1 Ch. Ch. R. 60; *Constable v. Howick*, 5 Jur. N. S. 331; *Prees v. Coke*, L. R., 6 Ch. App. 650.

O. XXXVII., rr. 9 & 10 of the Judicature Rules are as follows:—

9. In a redemption suit in default of payment being made according to the report, the defendant is to be entitled on an *ex parte* application in Chambers to a final order of foreclosure against the plaintiff, or to an order dismissing the bill with costs to be paid by the plaintiff to the defendant, forthwith after taxation thereof.

10. In a redemption suit where the plaintiff is declared foreclosed, directions may be given either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken, and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves, and such order shall have the same force and effect as a judgment obtained at the suit of the original defendant.

*Change in Accounts.*—Where the state of the account is changed by payment of money, receipt of rents and profits, by occupation rent, or otherwise, before the final order for foreclosure or sale is obtained, the party to whom the mortgage money is payable, may give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in the notice, and claims that there remains due in respect of such mortgage money, a sum certain, to be also named in the notice, G. O. Chy., No. 457. Upon the application for such final order, if the Judge thinks the sums named in the notice are proper to be allowed and paid under the circumstances, the order is to go without further notice, unless directed otherwise, *Id.* 458. This notice must be given before the day for payment arrives, *Knottinger v. Barber*, 1 Ch. Ch. R. 258.

The party by or to whom the mortgage money is payable, may apply in Chambers for an appointment or reference to ascertain and fix the amounts proper to



be allowed and paid, and such application may be either *ex parte*, or upon notice as the Judge may direct, G. O. Chy., Nos. 459, 460.

Where the suit becomes abated between date of report, and time fixed for payment in by subsequent encumbrancers, a new account must be taken after revivor, and a new day for payment fixed, giving the party who is to pay, an additional time to redeem equal to the time remaining to him under the terms of the report when the abatement took place, *Biggar v. Way*, 8 Pr. R. 158.

*Payment into Court.*—Money ordered to be paid into Court is to be paid into the Canadian Bank of Commerce, and in no other manner, G. O. Chy. No. 352; *Bloomfield v. Brooke*, 6 Pr. R. 265.

It may be paid in to the joint credit of the Referee in Chambers and of the party entitled to receive the money, or to the credit of the latter alone, G. O. Chy. No. 256.

Where money is to be paid at some time and place to be appointed by the master, he is to appoint same to be paid into some bank at its head office or at its branch or agency, to the joint credit of the party to whom same is payable, and of the Referee in Chambers, the party to whom the money is payable naming the bank desired by him, and the master naming place for such payment, G. O. Chy. No. 255. By the Jud. Act, O. LVI., r. 5, the Registrar of the Court of Chancery is to act as accountant until and unless some other person is appointed accountant.

Where before day for payment agency of bank is closed, it is necessary to take a new account and fix a new day for payment, and order must be served on party who has to pay, *King v. Connor*, 1 Ch. Ch. R. 274.

Where money is ordered to be paid into Court, payment to the solicitor of the party entitled to receive the money, is not good payment, *Blackburn v. Sheriff*, 1 Ch. Ch. R. 208.

But where a solicitor is retained to collect moneys and to take such proceedings as may be proper for that purpose, it would seem that payment to him would be a good payment, and would effectually discharge the party making such payment, *Moody v. Tyrrell*, 6 Pr. R. 313.

The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorize him to receive the mortgage money for his client. He must have an express authority for that purpose, *Ex parte Swinbank*, L. R. 11 Ch. D. 525.

The mortgagee's solicitor is not in general empowered merely by virtue of possession of security to receive either principal or interest of mortgage debt, or to receive the principal by virtue of an authority to receive the interest, *Fisher* 1284; *Palmer v. Winstanley*, 23 C. P. 586.

*Payment out.*—If the money is paid into a bank, to the sole credit of the party entitled to receive it, he may obtain same without order of the Court, G. O. Chy., No. 256.

Where consent of party, paying in money to joint credit of Referee and another is produced, Referee will sign a joint cheque with party to receive money for payment out to him.

Where defendant refused to consent to payment out of mortgage money, plaintiff may obtain an order for such payment, but at his own cost, *Bernard v. Alley*, 2 Ch. Ch. R. 91.; and the application must be made on notice, *Totten v. McIntyre*, 2 Ch. Ch. R. 462. A power of attorney or other written authority is necessary to authorize payment out of Court to the solicitor of the party entitled to receive it, *Swan v. Marmora*, 2 Ch. Ch. R. 155.

*Enlarging time for payment.*—The time fixed for payment of the mortgage money may be enlarged on application on sufficient grounds made on motion in Chambers by the person entitled to redeem, *Fisher*, s. 1688.

It is only in a foreclosure suit as a general rule, and not in a suit for redemption, that this indulgence is granted; because in the latter case, the mortgagee comes to the Court for relief, professing that his money is ready, but in a foreclosure suit, he redeems by compulsion. But on special circumstances, time has been enlarged even in a redemption suit. In foreclosure suits, the time may be enlarged more than once, *Id.* s. 1689. But the enlargement is not given, as of course, even upon the first application, some excuse for the default must be shewn, and a reason—

able prospect of getting the money, if the time be granted, and it should appear that the security is ample. The terms upon which an enlargement is usually granted is payment of the amount certified to be due for interest and costs, and also the costs of the application forthwith, *Street v. O'Reilly*, 2 Ch. Ch. R. 270; *Cameron v. Cameron*, 2 Ch. Ch. R. 375.

Where defendant had been hampered and hindered in selling or raising money on the lands in consequence of an advertisement signed and circulated by plaintiff's solicitors, time was enlarged and no costs of application were given to plaintiff, *Gilmour v. Meyers*, 2 Ch. Ch. R. 179.

*Opening foreclosure.*—The order for foreclosure absolute being final in form only, can be reopened in the discretion of the Court, having regard to all the circumstances of the case, and persons taking property under the order take it subject to such discretionary power, *Campbell v. Holyland*, L. R. 7 Ch. D. 166.

The applicant must not only shew that he will be able to redeem if further time be given, but must also account satisfactorily for non-payment at the proper time, *Fisher*, s. 1695; *Johnson v. Ashbridge*, 2 Ch. Ch. R. 252.

The foreclosure may also be opened by the act of the mortgagee; if he sue the mortgagor upon his covenant or bond, after foreclosure, upon finding the estate insufficient to satisfy the mortgage debt, the mortgagor acquires a new right to redeem, *Fisher*, s. 1697; *Mills v. Choate*, 2 Ch. Ch. R. 433.

But if mortgagee proceed first upon his covenant or bond and obtain part payment of his debt, he may still foreclose for the residue.

If after foreclosure the mortgagee has sold the estate to a stranger so as to be unable to restore it should the mortgagor redeem, he will not be permitted to sue the mortgagor for any deficiency, *Fisher*, s. 1698.

This rule does not apply where mortgagee has sold under a power of sale in the mortgage, *Fisher*, s. 1699.

There is a clear distinction between enlarging time for redemption before the day arrives for payment and opening foreclosure after final order. In the former case slight circumstances will induce the Court to grant the order; in the latter it must be shewn that the person who seeks to set order aside fully intended and was prepared to pay the money on the day, but was stopped by some accident from complying with the exigencies of the order, *Patch v. Ward*, L. R. 3 Ch. App. 212.

*Fraud.*—Foreclosure will also be opened if the decree has been obtained by false evidence or other fraudulent or collusive practice, *Fisher*, s. 1700.

But mere constructive fraud is not sufficient, the Court must be satisfied that the decree was obtained by the positive and actual fraud and contrivance of the party obtaining it, *Patch v. Ward*, L. R. 3 Ch. App. 213.

*Default in Redemption Suit.*—Where default is made by the plaintiff in a redemption suit, an order will be made dismissing the Bill on production of the usual proof of non-payment. Dismissal of a suit to redeem by reason of default in payment of the money, or for any other cause than for want of prosecution, operates as a judgment of foreclosure, because the mortgagor admits by his suit the title of the mortgagee and the defendant, and if he does not discharge it, is not allowed to harass the mortgagee by another suit for the same purpose, *Fisher*, s. 1779, 80.

In a redemption suit, if the plaintiff does not redeem the defendants, or such of them as he is ordered to redeem, the bill need not be dismissed; but where there are other defendants, in lieu of the Bill being dismissed, the plaintiff may be declared foreclosed, and direction may be given, either by the decree or by subsequent orders, as to the relative rights and liabilities of the defendants as amongst themselves; and such proceedings are in such case to be thereupon had, and with the same effect as in a foreclosure suit, *G. O. Chy. No. 466*.

And where a second mortgagee files a bill of redemption and makes default in paying at the time appointed, the mortgagor (as well as the first mortgagee) has, under General Order 466, the option of having a day thereupon appointed for redemption of the first mortgage by the mortgagor—there is nothing in the General Order to prevent any party availing himself of its provisions, *McKinnon v. Anderson*, 18 Gr. 684.

And see O. XLIX., rr. 9 & 10 of Judicature Rules *ante*.

Similar material is necessary for final order of sale as for final order of foreclosure above referred to.

*Sale.*—Where decree directs a sale instead of a foreclosure on default in payment, then on default being made, and an order for sale obtained, the premises are to be sold with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ about the same. And the purchaser is to pay his purchase money into Court, to the credit of the cause, subject to the further order of the Court, G. O. Chy., No. 433.

After decree or final order for sale has been obtained, it must be taken into the Master's office. He will grant a warrant to settle advertisement and conditions of sale which must be served on all necessary parties. At the time appointed by this warrant, the party having the conduct of the sale is to bring into the Master's office a draft advertisement, G. O. Chy., No. 373. Where a party not having the conduct of the sale, issued advertisements of sale, etc., an injunction was granted to restrain him, *Dean v. Wilson*, L. R. 10 Ch. D. 137. Usually the plaintiff has the conduct of the sale, but if he desires to bid thereat it will be given to some other party; if all parties to the suit desire to bid, a solicitor not connected with any of the parties will be appointed to conduct the sale, *Daniel* (5th ed.) 1153; *Ramsay v. McDonald*, 8 Pr. R. 283.

At time named in the warrant, the Master is to settle the advertisement, to fix time and place of sale, to name auctioneer, and make every other necessary arrangement preparatory, G. O. Chy., No. 378.

The advertisement is to contain the following particulars:

1. The short style of cause.
2. That the sale is in pursuance of an order of the Court.
3. The time and place of sale.
4. A short and true description of the property to be sold.
5. The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many and what lots.
6. What proportion of the purchase money is to be paid down by way of deposit and at what time or times, and whether the residue of such purchase money is to be paid with or without interest.
7. Any particulars in which the proposed conditions of sale differ from the standing conditions, G. O. Chy., No. 377.

The advertisement should set out all the improvements on the property, and should be as short as possible, *Heward v. Ridout*, 1 Ch. Ch. R. 244; *Barter v. Finlay*, 1 Ch. Ch. R. 230.

The standing conditions of sale are given in note to, G. O. Chy., 397.

Where it is thought expedient, the Master may fix an upset price or reserved bidding, and that this has been done must be notified in the conditions of sale, G. O. Chy. No. 380.

Liberty to have a reserved bid was granted on a motion in Chambers, where it was accidentally omitted in settling terms of sale, on payment by plaintiff of costs of the application, *Fraser v. Bens*, 1 Ch. Ch. R. 71.

All parties may bid without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary situation; and where any parties are to be at liberty to bid, it must be notified in the conditions of sale, G. O. Chy. No. 381.

The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the Judge or Master appointed at the meeting before mentioned, G. O. Chy. No. 382.

The Master or his Clerk is to conduct the sale where no auctioneer is employed' G. O. Chy. No. 383.

Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale, G. O. Chy. No. 384.

A solicitor having the conduct of a sale cannot withdraw the property offered after a bid has been made, *McAlpine v. Young*, 2 Ch. Ch. R. 86.

A sale under the decree of the Court cannot be adjourned by the vendor's solicitor without the authority of the Court, *O'Connor v. Woodward*, 6 Pr. R. 223.

Upon a sale without reserve, it is not open to the vendor to refuse a bid, however small, *O'Connor v. Woodward*, 6 Pr. R. 223.

The "highest bidder" is the "purchaser" under the General Orders, and the omission of the auctioneer to declare him so cannot deprive him of his position, *McAlpine v. Young*, 2 Ch. Ch. R. 171.

The deposit is to be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and is to be forthwith paid by him into Court, G. O. Chy. No. 385.

Where the party having the conduct of the sale neglects to pay into Court the deposit paid to him by the purchaser at the time of sale, the Court will, on the application of the purchaser, order him to do so, *Crooks v. Glenn*, 1 Ch. Ch. R. 354.

After the sale is concluded, the auctioneer, where one is employed, is to make the usual affidavit, according to the present practice; and where no auctioneer is employed, the Master or his clerk is to certify to the same effect, G. O. Chy. No. 386.

The report on sale is to be in the form set forth in Schedule Q, or as near thereto as circumstances permit. See the form in notes to G. O. Chy. No. 387.

Where a sale has been had and the directions of the Master have not been followed, the vendor will have to make out, at his own expense, that all parties interested have not been injured, in order to have sale confirmed, *Royal Canadian Bank v. Dennis*, 4 Ch. Ch. R. 68. The confirmation of a sale may be opposed before the Master and the sale disallowed, on grounds which would afford material for a motion to set aside the sale, *Beaty v. Radenhurst*, 3 Ch. Ch. R. 344. The purchaser should be notified, *Id.* A purchaser at a sale under a decree, is not bound by any irregularity in the proceedings, so as to cause him to lose the benefit of the purchase, *Dickey v. Heron*, 1 Ch. Ch. R. 141.

Where a purchaser had obtained a conveyance from a mortgagee, who had obtained a final order of foreclosure, and the decree and final order were regular on the face of them:—Held that the purchaser was not bound to inquire into the regularity of the proceedings upon which decree and final order were founded, and was not affected by irregularities in the foreclosure proceedings, of which he was ignorant, *Gunn v. Doble*, 15 Gr. 655. See *McLean v. Grant*, 20 Gr. 76; *Shaw v. Crawford*, 4 App. R. 371.

A sale must be objected to by motion to the Court to set aside the same; and notice of the motion must be served upon the purchaser and on the other parties to the cause, but the biddings are only to be opened on special grounds whether the application is made before or after the report stands confirmed. G. O. Chy. No. 388.

*Confirming and setting aside sale.*—Where an irregularity had occurred in advertising a sale, but no injury had thereby accrued, and a fair price had been obtained, the Court confirmed the sale, *Cayley v. Colbert*, 2 Ch. Ch. R. 455.

But not where the master had refused to approve of the sale, *Thomas v. McCrae*, 2 Ch. Ch. R. 456.

Where a party not authorized to bid under the general orders and conditions of sale, as for example the party having the conduct of the sale, has been declared the highest bidder, he should, as early as possible after the sale, apply by notice of motion returnable in Chamber, which should be served on the other parties to the cause, that notwithstanding that he has not obtained leave to bid, he may be certified to be the purchaser at the price bid by him at such sale, *Daniel* (5th ed.), p. 1160.

This application should be made before the report on sale is signed, and will not be granted if any of the parties to the suit object, *Crawford v. Boyd*, 6 Pr. R. 278.

Such an order cannot be made by a local Master who has made a decree for partition or administration, *Re Laycock*, 17 U. C. L. J. 171.

The solicitor of the party having conduct of sale cannot purchase at such sale, *Guest v. Smythe*, L. R. 5. Ch. App. 551.

Where an unauthorized person is the highest bidder, the sale is not absolutely void, but only voidable at the instance of those beneficially interested in the purchase money, *Crawford v. Boyd* (*supra*).

*Opening biddings.*—An offer of an advanced price is not a sufficient ground whether purchaser is a stranger or a party who has obtained leave to bid, *Mitchell v. Mitchell*, 6 Fr. R. 232.

An inadequate description of the property in the advertisement is sufficient ground, if calculated to mislead or deter the public from purchasing, but not otherwise, *Creswick v. Thompson*, 6 Fr. R. 52; and see *Rodgers v. Rodgers*, 13 Gr. 143.

*Abortive sale.*—Where the sale has proved abortive for want of bidders, the property may be advertised and put up for sale again without further order, *Sherwood v. Campbell*, 1 Ch. Ch. R. 299.

Where a sale has proved abortive by reason of the purchaser refusing to complete it, it is necessary to obtain an order in Chambers for a re-sale on default of payment in by the purchaser in a limited time, and the purchaser will be directed to pay the costs of the motion and the deficiency, if any, on such re-sale, *Crooks v. Crooks*, 4 Gr. 376.

But if purchaser has become insolvent and unable to complete the purchase he will be absolved from it, *re Heeley*, 1 Ch. Ch. R. 54.

An order for payment in by the purchaser within a limited time, directing in default a re-sale and payment of deficiency, requires personal service upon the purchaser unless otherwise ordered, and it is irregular to issue an execution for the amount ordered to be paid in before a re-sale can take place, per the Referee in *Myers v. Myers*, 16th March, 1881.

*Foreclosure after abortive sale.*—Where a sale has proved abortive an order will be made foreclosing all the defendants who have not already been foreclosed. The proper course is to serve a notice of motion upon the mortgagors and encumbrancers (if any) who have proved claims, *Odell v. Doty*, 1 Ch. Ch. R. 207.

The usual two clear days' notice is sufficient.

Where a foreclosure is asked after an abortive sale the usual order is to give parties entitled to redeem three months' time and in default foreclosing them, *Girdlestone v. Gunn*, 1 Ch. Ch. R. 212.

An encumbrancer who has obtained a sale instead of a foreclosure cannot be foreclosed without being given usual time to redeem, *London & Canadian v. Pulford*, Referee 19th Oct. 1878.

*Payment of purchase money.*—At any time after the confirmation of the sale the purchaser may pay his purchase money and interest, if any, or the balance thereof, into Court without further order, upon notice to the party having the conduct of the sale, and when he is entitled to be let into possession of the estate, he may, if possession is wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause possession to be delivered to him, *G. O. Chy.*, No. 339.

Where money is ordered to be paid into Court, payment to solicitor of party entitled is not a good one, *Blackburn v. Sheriff*, 1 Ch. Ch. R. 208; and see *supra* "Payment into Court."

On a sale under a decree the purchaser, except under special circumstances, will not be compelled to pay his purchase money into Court until he has accepted or approved of the title, or the Master has reported that the vendor can make a good title, *Ellwood v. Pierce*, 7 Fr. R. 427; *McDermid v. McDermid*, 8 Fr. R. 28.

Until the report is confirmed, the bidder is not considered as the purchaser, and is not liable for any loss by fire or otherwise, which may happen to the estate in the interim, *Stephenson v. Bain*, 8 Fr. R. 260.

Upon a sale by tender where damages were occasioned to the premises sold between the tender and its acceptance, it was held that the purchaser was not entitled to compensation on the ground that there was no binding contract between the vendor and purchaser until the acceptance of the tender, and that the tender must be considered as a continuing offer from day to day until accepted, *Tracey v. Ireland*, per V.-C. Proudford, 1881.

*Examination of title.*—After a sale under an order is confirmed, the vendor is, forthwith upon demand, to deliver an abstract of title to the purchaser, and if the purchaser does not serve objections within seven days, he is to be deemed to have



accepted the abstract as sufficient. If objections are served, the vendor is to answer them within fourteen days; and if the purchaser is still dissatisfied, and if the parties cannot otherwise agree, either party may obtain from the Master a warrant to consider the abstract, *G. O. Chy.*, Nos. 390-396.

On receiving an abstract of title the purchaser has seven days within which to object to the completeness of the abstract, and after any question of its completeness is disposed of and the abstract made perfect in the sense of being complete, seven days to object to the title; if, however, he takes his objections to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title, *McManus v. Little*, 3 Ch. Ch. R. 263. No objections other than those specifically taken will be entertained by the Master. An abstract is complete when it contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes part of the title. A purchaser on receipt of the abstract is bound, under *G. O. 390-3*, within seven days, to take all the objections he intends to take to the sufficiency of the abstract. These being removed it is not open to the purchaser to take any further objections to the sufficiency of the abstract; he can only require the vendors to verify the title shewn on the abstract, *Bank of Montreal v. Fox*, 6 Pr. R. 217.

By taking a vesting order or a conveyance, the purchaser waives all objections to title. He also takes upon himself the responsibility of obtaining possession, *Bull v. Harper*, 6 Pr. R. 36.

Where, after a sale under decree, an abstract had not been demanded and no steps had been taken by the purchaser or his representatives for twenty-three months after the confirmation of the report, a reference as to title was refused and the purchaser was held to have accepted the title, *Ontario Bank v. Sirr*, 6 Pr. R. 216.

A purchaser at a sale under decree, who goes into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title, unless the sanction of the Court has been obtained to his entering into possession without waiving his right to call for a good title, *Patterson v. Robb*, 6 Pr. R. 114.

But acceptance of title by the act of the purchaser in going into possession, was held to be waived by the vendor's solicitors delivering an abstract of title when demanded and answering some of the requisitions, *Aldwell v. Aldwell*, 6 Pr. R. 183.

An abstract of title and title deeds having been sent to a purchaser in November, 1869, at his own request, for the purposes of examination and advice, intimated no objection to the title, and in correspondence with the vendor's solicitors implied that he was content with the title, but in June, 1870, he claimed the right of investigating it afresh:—Held that by the lapse of time and the letters which he had written, he had impliedly accepted the title, *Rae v. Geddes*, 18 Gr. 217.

For a discussion of what will be a sufficient taking of possession of a purchased house under the contract, see *People's Loan Co. v. Bacon*, 27 Gr. 294.

*Interest on purchase money* runs from the date when after acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify a purchaser in not taking possession, *Rae v. Geddes*, 3 Ch. Ch. R. 404.

*Conveyance*.—After the title has been accepted and full purchase money paid into Court, the purchaser is entitled to a conveyance or a vesting order.

Before accepting title by means of a vesting order, purchaser has a right to call for evidence that all persons whose interests were intended to be disposed of were alive at the time of sale, *Slater v. Fiskin*, 1 Ch. Ch. R. 1.

Where owing to there being infants interested it was necessary to have the conveyance settled by the Master, the purchaser was allowed his costs of doing so, *re McMorris*, 3 Ch. Ch. R. 430.

If a person wishes to appeal from the Master's settling of a conveyance, the proper course is for the Master to report, and then the appeal lies in the usual way, *Rae v. Geddes*, 3 Ch. Ch. R. 408.

A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the Court, *Ross v. Steele*, 1 Ch. Ch. R. 94.

Where plaintiff, who was mortgagee in fee of lands, sold under a decree, had become purchaser thereof, a vesting order was refused in his favour, *Bowen v. Fox*, 1 Ch. Ch. R. 387.

Usual practice in such a case is to issue an order declaring plaintiff entitled to the lands absolutely free from any equity of redemption on part of those entitled to it. When the mortgagee purchases according to the doctrine of the Common Law the legal title is already in him, and the sale confirms him in the possession of the property, *Jones on Mortgages*, s. 1660.

Under the 5th clause of the standing conditions of sale, the purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor to procure its execution by all necessary parties. Until conveyance is completed and delivered to the purchaser, he may properly resist payment out of Court of any part of his purchase money, *Weiss v. Crofts*, 6 Pr. R. 151.

Where any of the parties to the suit refuse to execute a conveyance to which they have been properly made parties, the purchaser may apply by notice of motion that they may be ordered to execute the same within a limited time. The order made should be served on the party personally, in the usual way and obedience thereto will be enforced by committing the party to gaol, in accordance with the usual practice of the Court, *Daniel's Practice*, 1173; *Westacott v. Cockerline*, 2 Ch. Ch. R. 442.

*Possession*.—Under the standing conditions of sale, a purchaser is not entitled to possession until he has paid the full amount of his purchase money into Court, *Bank of Montreal v. Fox*, 6 Pr. R. 217.

If possession then withheld, it is a subject for compensation on application in Chambers, *Thomas v. Buxton*, L. R. 8 Eq. 120; and see *G. O. Chy. No. 389*.

After sale under decree, an order for delivery of possession, will not, as a general rule, be made against a person not a party to the suit; and *quære*, if there be any jurisdiction over strangers, except in the plain case of parties taking possession, *pendente lite*, without any pretence of paramount title, *Trust & Loan v. Start*, 6 Pr. R. 90.

Order 404, as to an order being obtained for possession, refers only to mortgage cases, *Mavety v. Montgomery*, 1 Ch. Ch. R. 21; *Chisholm v. Allen*, 2 Ch. Ch. R. 411.

An application for an order for possession cannot be made the means of trying the right to possession between a landlord and his tenant or a trespasser, *Scott v. Black*, 3 Ch. Ch. R. 323.

Court will not make an order against tenants of mortgagor or owner of equity of redemption, although such tenancy began after the mortgage was made, *Bank of Montreal v. Ketchum*, 1 Ch. Ch. R. 117.

The order is made only after notice, and it must be shewn on the application that the mortgagor is in possession, *Buckley v. Ouellette*, 2 Ch. Ch. R. 439; *Hodkinson v. French*, 1 Ch. Ch. R. 201; *McKenzie v. Wiggins*, 2 Ch. Ch. R. 391.

On moving to commit for not obeying such an order, it must be shewn that possession was demanded, *Neveux v. Labadie*, 1 Ch. Ch. R. 13; but see *Hodkinson v. French*, 1 Ch. Ch. R. 201.

A purchaser by taking a conveyance or a vesting order, takes upon himself the responsibility of obtaining possession and if evicted by a title to which his covenants do not extend, has no right to compensation on that account, *Bull v. Harper*, 6 Pr. R. 36.

Misdescription in the advertisement is a ground for compensation even after conveyance.

Where conditions of sale stated that taxes would be paid by the vendor, and the purchaser, relying on this, took a vesting order without first seeing that the taxes were paid, a motion for compensation in respect of taxes in arrear at time of sale was refused with costs, *Kincaid v. Kincaid*, 6 Pr. R. 93; *re Buck*, 6 Pr. R. 98.

But where after accepting a vesting order a purchaser ascertained that land sold had been previously sold for taxes, he was held entitled to payment out of the money in Court of the amount required to redeem the land, with his costs of the motion, *Turrill v. Turrill*, 7 Pr. R. 142.



Where a bill was filed by a second mortgagee, the first mortgagee not being a party, and the purchaser at the sale paid his money into Court and took out a vesting order, but it appeared that he thought he was purchasing free from encumbrances, and was ignorant of the prior mortgage—he was held entitled to an order for the payment out of Court of the amount due thereon, *Fleming v. McDougall*, 8 Fr. R. 200.

#### ADMINISTRATION SUITS.

**467.** Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person, may apply to the Court upon motion, without bill filed, or any other preliminary proceeding, for an order for the administration of the estate, real or personal, of such deceased person. (3rd June, 1853; Ord. 15, s. 1.)

The Chancery Orders 467 to 487, and 638 to 650, apply to all the Divisions of the High Court of Justice, Judicature Act, O. I. r. 3.

Under Ord. 638 (10th Jan. 1879) any adult person entitled to apply under this Ord. 467 or under Ord. 471, for an administration order may apply to the Master in the county town of the county (other than the County of York) where the deceased person whose estate it is desired to administer, resided at the time of his death; and such Master may, on fourteen days' notice being given to the person or persons entitled to notice of such an application, make an order for the administration of, and proceed to administer, such estate in the least expensive and most expeditious manner. In the County of York the application is still made in Chambers, and as to proceedings in that County the practice before the Orders of 1879 is still in force.

The following rules as to parties given in Ord. 58, apply to administration suits: Rule 1. A residuary legatee, or next of kin may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin. Rule 2. A legatee interested in a legacy charged upon real estate; or a person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate. Rule 3. A residuary devisee or heir may have the like decree, on their serving any co-residuary devisee or co-heir. Rule 6. An executor, administrator or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts.

As to serving notice of the decree in such cases, see notes to Ord. 244.

The proceedings under this order are intended for simple cases only, *Acaaster v. Anderson*, 19 Beav. 161; *Rump v. Greenhill*, 20 Beav. 512; and see *Nudel v. Elliott*, 1 Ch. Ch. R. 326; *Eberts v. Eberts*, 25 Gr. 565; *Heywood v. Siewwright*, 8 Fr. R. 79; and where executors are charged with misconduct, a bill must be filed, *re Babcock*, 8 Gr. 409; but where a plaintiff, without sufficient cause, files a bill for administration instead of applying for an order on notice of motion, he is not entitled to the extra costs thereby occasioned, *Sovereign v. Sovereign*, 15 Gr. 559; *Eberts v. Eberts*, *supra*.

Where there is more than one personal representative all must be notified, notwithstanding that one of them be resident out of the jurisdiction, *Freborn v. Carroll*, 6 Fr. R. 188. A decree for administration cannot be made against an executor *de son tort* where there is no legal personal representative before the Court, *Rowell v. Morris*, L. R. 17 Eq. 20; *Outram v. Wyckhoff*, 6 Fr. R. 150; notice of motion for an administration order having been served on the widow of the intestate as administratrix, the application was refused, there being no evidence produced that letters of administration had been granted to her, *Fowler v. Marshall*, 1 Ch. Ch. R. 29; but where the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administra-

tion, or copy thereof, *re* Bell, Bell *v.* Bell, 3 Ch. Ch. R. 397. A creditor making application must be a creditor of the deceased person and not merely a creditor of his executor or administrator, thus an application by a person who had made advances to the executor was refused, *Campbell v. Bell*, 16 Gr. 115; *Farhall v. Farhall*, L. R. 7 Ch. App. 123; *re Pettee*, *McKinley v. Beadle*, 6 Pr. R. 157.

A legatee, or next of kin, cannot apply for administration until the expiration of a year from the death of the person whose estate is sought to be administered, *Slater v. Slater*, 3 Ch. Ch. R. 1; *Vivian v. Westbrooke*, 19 Gr. 461.

When the estate in question is small, a suit for administration should not be brought until all reasonable means of avoiding the suit have been exhausted; and where a next friend of an infant brought a suit for administration, without having taken steps to avoid litigation, and the suit afterwards appeared to have been unnecessary, he was ordered to pay the costs, *Hutchinson v. Sargent*, 17 Gr. 8; *McAndrew v. Lafamme*, 19 Gr. 193.

Where an executor, in answer to an application for administration, swore that the personal estate had not exceeded \$50, the Court, before it would make an order for administration, required the applicant to file an affidavit stating that he had reason to believe and did believe that the result of the proceedings would shew a substantial balance of personal estate to be divided among the legatees, *Foster v. Foster*, 19 Gr. 463; administration was refused on the application of a legatee whose claim, including interest on his legacy, only amounted to \$28, notwithstanding that it was alleged that other legacies remained unpaid which amounted to a considerable amount, *Reynolds v. Coppin*, 19 Gr. 627.

And where a creditor brings an administration suit after being informed that there are no assets applicable to the payment of his claim, if the information appear by the result to be substantially correct, he may have to pay the costs of the suit, *The City Bank v. Scatcherd*, 18 Gr. 185; where the application is made by a creditor whose claim is disputed, he must establish his debt by proper evidence; his own uncorroborated affidavit is insufficient, *Vivian v. Westbrooke*, 19 Gr. 461.

After notice of motion served, a commission may be obtained for the examination of witnesses with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate, *Farrell v. Cruikshank*, 1 Ch. Ch. R. 12.

After an order made upon summons the Court will stay an action at law against the executor, as after a decree obtained upon a bill, *Gardiner v. Garret*, 20 Beav. 469.

A motion having been made, upon notice, for an administration order, the order not having been drawn up and no steps having been taken for four years, an application in Chambers for a direction to the Registrar to draw up the order, was refused, and new notice required to be served, *re Forrester*, 1 Ch. Ch. R. 29.

Executors having objected to pay into Court a sum of money, on the ground that it had been paid to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the Master's office:—Held that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these inquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character, *re Babcock*, 8 Gr. 409.

Where several suits are instituted for administration of a testator's estate, and a question arises as to their amalgamation, and the conduct of the cause, the preference will be given to a residuary legatee, or other person who has an interest in the residue, in preference to a creditor, *Penny v. Francis*, *Woodhatch v. Francis*, 7 Jur. N. S. 248.

**468.** The notice of motion is to be in the form or to the effect set forth in schedule U hereunder written, and must be served upon the executor or administrator. (3rd June, 1853; Ord. 15, s. 1.)

The Schedule U is as follows :—

In the matter of the estate of E. F., late of the Township of Vaughan, in the County of York, deceased.  
A. B. against C. D.

To C. D., Executor of E. F., deceased.

Take notice that A. B., of the City of Toronto, in the County of York, Esquire, (or other proper description of the party), who claims to be a creditor upon the estate of the above named E. F., will apply to the Court of Chancery, in Chambers, at Osgoode Hall, in the City of Toronto, on the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of \_\_\_\_\_, for an order for the administration of the estate, real and personal, of the said E. F., by the Court of Chancery; and upon such application will be read the affidavits of (state the materials upon which the application is founded) this day filed.

If you do not attend either in person or by your solicitor at the time and place above mentioned, such order will be made in your absence as may seem just and expedient.

Dated, etc.

G. H.,

Of the City of Toronto, Solicitor for the above named A. B.

This notice of motion is to be served upon all proper parties at least fourteen days before the day named for hearing the application, Ord. 552, 638.

For form of notice under the Judicature Act, see Forms, No. 12.

It is no bar to the appointment of a guardian *ad litem* to an infant defendant, in an administration suit, that the application for the guardian is made before the return of the notice of motion for the administration order, *Barry v. Brazil*, 1 Ch. Ch. R. 237.

Next of kin are not necessary parties to an administration suit, but should be served with an office-copy of the decree, *English v. English*, 12 Gr. 441; *Rodgers v. Rodgers*, 13 Gr. 457.

**469.** Upon proof by affidavit of the due service of the notice of motion, or on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and upon proof by affidavit of such other matter, if any, as the Court requires, the Court may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case require; and the order so made is to have the force and effect of a decree to the like effect made on the hearing of a cause between the same parties. (3rd June, 1853; Ord. 15, s. 1.)

Some evidence of the applicants having a right to call for administration of the estate must be furnished, *re Clark*, 2 Ch. Ch. R. 57; and see notes to Ord. 467.

The facts that the estate is small, that no imputation is made against the executors, and that it is unadvisable to incur legal expenses, are no answer to a motion for administration by a legatee against the executors, *re Falconer*, 1 Ch. Ch. R. 273. Where in an administration suit the whole of the real and personal estate of the intestate was insufficient to pay the creditors, the heir at law and administratrix were allowed their costs as between solicitor and client, *Tardrew v. Howell*, *Parry v. Howell*, 9 W. R. 296.

A party appealing from a decree in an administration suit successfully, was allowed the costs of the appeal out of the estate, *Menzies v. Ridley*, 2 Gr. 514.

Costs ought to be given out of the estate, for those proceedings only which are commenced for the benefit of the estate, or which have in their result been of benefit, *Bartlett v. Wood*, 9 W. R. 817; see also as to costs, *Maddison v. Chapman*, 1 J. & H. 470; *Barnwell v. Iremonger*, 1 Dr. & Sm. 255; *Sullivan v. Bevan*, 20 Beav. 399; *Norris v. Bell*, 9 Gr. 23; *Millar v. McNaughton*, 11 Gr. 308; *Blain v. Terryberry*, 12 Gr. 221.

**470.** The Court is to give any special directions touching the carriage or execution of the order, which it deems expedient; and in case of applications for any such order by two or more persons, or classes of persons, the Court may grant the same to such one or more of the claimants as it thinks fit; and the carriage of the order may be subsequently given to any party interested, and upon such terms as the Court may direct. (3rd June, 1854; Ord. 15, s. 1.)

Under this order the Master has power to give any special directions he may think proper respecting the carriage of the order, where there are conflicting claims, and also to transfer its carriage from one party to another, if occasion should require. The rule being to give the conduct of the proceedings, *ceteris paribus*, to the party most interested in prosecuting them properly and economically, *Perrin v. Perrin*, 3 Ch. Ch. R. 452; and see *re Adams*, *Adams v. Muirhead*, 6 P. R. 283, and see notes to Ord. 212.

Although proceedings in the Master's office may, under the General Order, be taken *ex parte* against a defendant who has allowed a bill to be taken *pro confesso*, that mode of proceeding is irregular under an administration order without bill, *re Pattison*, 12 Gr. 47.

**471.** An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, and all the provisions of the foregoing Orders are to extend to applications by an executor or administrator. (3rd June, 1853; Ord. 15, s. 2.)

Where the personal representative makes application for the administration of the personal estate, the application may be granted *ex parte*, per *Esten*, V. C., *Re Dunlevy*, see Order Book 11, fo. 778; *Re Etta*, 6 P. R. 159; *Re Bromley*, V. C. Blake 28th Jan. 1878.

There appears to be some conflict of authority as to whether a deficiency of assets for the payment of debts, is a sufficient ground for the personal representative to apply to the Court for administration, see *Swetnam v. Swetnam*, 6 P. R. 149, *Re Etta*, 6 P. R. 159, *Re Shipman*, Wallace v. Shipman, 24 Gr. 177; *Marsh v. Marsh*, 7 P. R. 129; *re Jack*, *Jack v. Jack*, 13 W. C. L. J. 358; *re Bromley supra*. In the latter case it appeared that the assets were insufficient, that the applicant had been sued by one creditor in the Division Court, and that another creditor had written urging the applicant to obtain an administration order, and the application was granted. But it seems clear that an executor has no right to institute a suit for administration merely to obtain an indemnity by passing his accounts, *White v. Cummins*, 3 Gr. 602; *Cole v. Glover*, 16 Gr. 392; *Barry v. Barry*, 19 Gr. 458; and he may be refused his costs of a suit unnecessarily brought, *Graham v. Robson*, 17 Gr. 318; or he may be ordered to pay the costs of a suit which turns out to be improperly instituted, *McGill v. Courtice*, 17 Gr. 271; *Sullivan v. Sullivan*, 16 Gr. 94; and where the guardian *ad litem* of an infant defendant had made no objection to the unnecessary proceedings, no costs were given either to the executors or the guardian of such proceedings, *Springer v. Clark*, 15 Gr. 664. So also executors have been charged with so much of the costs of a reference as were incurred in establishing charges against them which they disputed, *Stewart v. Fletcher*, 18 Gr. 21.

**472.** No accounts or inquiries in respect of the real estate are to be directed, unless notice of the application has been given to the heirs and devisees interested therein, or one or more of them. (20th Dec. 1865; Ord. 13.)

**473.** After inquiries directed in respect of the personal estate, the Court may, in a proper case, after notice given to those interested in the real estate, or to one or more of them, make a supplemental order in respect of the real estate, upon such terms as the Court sees fit. (20th Dec. 1865; Ord. 13.)

**474.** In taking an account of a deceased's personal estate under an order of reference, the Master is to inquire and state to the Court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the decree, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will. (3rd June, 1853; Ord. 42, s. 14.)

**475.** Every advertisement for creditors affecting the estate of a deceased person, which is issued pursuant to an order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master directs, or to his solicitor, to be named and described in the advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form set out in schedule V, Form No. 1, with such variations as the circumstances of the case require; and at the directing such advertisement, a time is to be fixed for adjudicating on the claims. (20th Dec. 1865; Ord. 22.)

The advertisement for creditors is as follows:—

Pursuant to a decree [or an order] of the Court of Chancery, made in [the matter of the estate of A. B., and in] a cause, S. against P. [short title], the creditors of A. B., late of , in the county of , who died in or about the month of , 18 , are on or before the day of , 18 , to send by post, prepaid to E. F., of , the solicitor of the defendant C. D., the executor [or administrator] of the deceased [or as may be directed], their Christian and surnames, addresses and description, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said decree [or order]. Every creditor holding any security is to produce the same before me, at my Chambers, at, etc., on the day of , 18 , at o'clock in the noon, being the time appointed for adjudication on the claims.

Dated this day of , 18 .

G. H. Master.

Where an executor or administrator has advertised for creditors under R. S. O., c. 107, s. 34, no further advertisement need be issued in an administration suit, *Cuthbert v. Wharmby*, Seton (4th ed.), 805, 829; W. N. (1869) 12.

As to the duty of the executor or administrator with reference to claims sent in pursuant to such advertisement, see Ord. 479, 480.

**476.** No such creditor need make an affidavit or attend in support of his claim (except to produce his security, if any,) unless he is served with a notice requesting him so to do, as hereinafter provided. (20th Dec. 1865; Ord. 23.)

of the personal notice given to more of them, real estate, upon 1865; Ord. 13.)

personal estate acquire and state personal estate is compute interest decree, and on deceased's death, by the will. (3rd

ecting the estate nt to an order, is hereby limited, to ts, or to his soli- vortisement, the full particulars and the nature of advertisement is No. 1, with such uire; and at the fixed for adjud- . 22.)

ancery, made in [the [short title], the credi- in or about the month send by post, prepaid xecutor [or administra- and surnames, addresses ment of their accounts, a default thereof, they decree [or order]. Every me, at my Chambers, the noon, be'ing the

G. H. aster. creditors under R. S. O., an administration suit, 1869) 12.

reference to claims sent in

avrit or attend in security, if any,) ng him so to do, Ord. 23.)

**477.** Every such creditor is to produce before the Master, the security (if any) held by him, at such time as is specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the Master directs, in the form set forth in schedule V, Form No. 2, is to produce all other deeds and documents necessary to substantiate his claim before the Master, at such time as is specified in the notice. (20th Dec. 1865; Ord. 24.)

The following is the form of notice referred to:—

(Short Title).

You are hereby required to produce, in support of the claim sent in by you, against the estate of A. B., deceased [describe any documents required], before me at my Chambers, at, etc., on the day of , 18 , at o'clock in the noon.

Dated this day of , 18 .

G. R., of, etc., Solicitor for the plaintiff,  
[or defendant, or as may be].

To Mr. S. T.

**478.** In case a creditor neglects or refuses to comply with the next preceding Order, he is not to be allowed any costs of proving his claim, unless the Master otherwise directs. (20th Dec. 1865; Ord. 25.)

**479.** The executor or administrator of the deceased, or such other party as the Master directs, is to examine the claims sent in pursuant to the advertisement, and is to ascertain, as far as he is able, to which of such claims the estate of the deceased is justly liable. (20th Dec. 1865; Ord. 26.)

**480.** The executor or administrator, or one of the executors or administrators, or such other party either alone or jointly with his solicitor, or other competent person, or otherwise, as the Master directs, is, at least seven clear days before the day appointed for adjudication, to file an affidavit which may be in the form No. 3, in schedule V, verifying a list of the claims, the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof, respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due, and proper to be allowed, and the reasons for such belief. (20th Dec. 1865; Ord. 26.)







*Second Part.—Claims which ought to be proved by the Claimants.*

Serial No.	Names of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount Claimed.
				£ c.

**481.** In case the Master thinks fit so to direct, the making of the affidavit referred to in the next preceding Order, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give. (20th Dec. 1865; Ord. 27.)

**482.** At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, without proof by the creditors, and may direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto, as he thinks fit, and may, if he so thinks fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed. (20th Dec. 1865; Ord. 28.)

And see as to proving claims, Order 224, and notes thereto.

**483.** Notice is to be given by the executor or administrator, or such other party as the Master directs: (1.) To every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and such notice may be in the form No. 4 in schedule V; (2) And to every such creditor as the Master directs to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice, (which may be in the form No. 5 in schedule V,) not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with such notice, his claim or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time. (20th Dec. 1865; Ord. 29.)

as may be], the  
punity of  
ay as follows :—

, and marked A,  
ent in to me by  
suant to the ad-  
8

per writing now  
the same with  
be, and state any  
as I am able, to

of opinion, and  
the amounts set  
ting marked A;  
ts are justly due  
respective claim-

tly liable to the  
ked A, and that  
claimants, [or, I  
tly liable to the  
ed A, or whether  
without further

orn, etc.

. F., the solicitor  
to be creditors of  
behalf, dated the

ed and shewn to  
in his affidavit,  
8

W. B., etc.

evidence.

at d.	Amount proper to be allowed.
c.	£ c.

The notice that a claim has been allowed in whole or in part is as follows :—

(Short Title.)

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of \$ , [with interest thereon at \$ per cent., per annum, from the day of , 18 , and \$ for costs, or as the case may be].

*If part only allowed, add.*—If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file [etc., as in Form No. 5.]

Dated this day of , 18 .

G. R., of, etc., Solicitor for the plaintiff  
[or defendant, or as may be.]

To Mr. P. R.

The notice that the creditor is required to prove his claim is the following :—

(Short Title.)

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased. You are to file such affidavit as you may be advised in support of your claim, and give notice thereof to Master in Chancery [or as the case may be], on or before the day of , 18 ; and to attend personally or by your solicitor, at his Chambers, on the day of , 18 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

Dated this day of , 18 .

G. R., of, etc., Solicitor for the plaintiff.  
[or defendant, or as may be.]

To Mr. S. T.

**484.** A creditor who has not before sent in particulars of his claim pursuant to the advertisement, may do so seven clear days previous to any day to which the adjudication is adjourned. (20th Dec. 1865 ; Ord. 30.)

See *Lashley v. Hogg*, 11 Ves. 602 ; *Angell v. Haddon*, 1 Madd. 529, cited in notes to Ord. 224.

**485.** After the time fixed by the advertisement, no claim is to be received (except as before provided in case of an adjournment,) unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs. (20th Dec. 1865 ; Ord. 31.)

**486.** Where an order is made for payment of money out of Court to creditors, the party whose duty it is to prosecute such order is to send to each creditor, or his solicitor (if any,) a notice that the cheques may be obtained from the registrar; and such notice may be in form No. 6 in schedule V, and such party is, when required, to produce any papers necessary to enable the creditors to receive their cheques. (20th Dec. 1865 ; Ord. 32.)

The notice that cheques may be obtained is as follows :—

(Short Title.)

The cheques for the amounts directed to be paid to the creditors of A. B., deceased, by an order made in this [matter or] cause dated the day of 18, may be received at the Accountant's Office, in Osgoode Hall, Toronto, on and after the day of 18.

G. R., of, etc., solicitor for the plaintiff,  
[or, defendant, or as may be.]

To Mr. W. S.  
etc.

**487.** Every notice by these Orders, required to be given is, unless the Master otherwise directs, to be deemed sufficiently given and served if transmitted by post, prepaid, to the creditor to be served, according to the address given by the creditor in the claim sent in by him pursuant to the advertisement, or, in case the creditor has employed a solicitor, to such solicitor, according to the address given by him. (20th Dec. 1865; Ord. 33.)

#### INFANTS AND PERSONS OF UNSOUND MIND.

[Orders 517 to 521, which provided for the appointment of guardians *ad litem* to infant defendants by bill, seem not now in force, see Judic. Act, O. VI., rr. 4, 5.]

**522.** When infants, or persons of unsound mind not so found by inquisition, are made parties to suits after decree, or are served with notice of motion under Order 467, guardians *ad litem* are to be appointed for them in like manner as they are now appointed at any time after bill filed. (8th Nov. 1856.)

It is no bar to the appointment of a guardian *ad litem* to an infant defendant, in an administration suit commenced by notice of motion, that the application for a guardian is made before the return of the notice of motion for administration, *Barry v. Brazil*, 1 Ch. Ch. R. 237.

See Judic. Act O. VI., rr. 4, 5; O. IX., rr. 1, 2.

**523.** Where a person required to be served with an office-copy of a decree, pursuant to Order 60, is an infant, or a person of unsound mind not so found by inquisition, the service is to be effected upon such person or persons, and in such manner, as the Master before whom the reference under the order is being prosecuted directs. (1st April, 1867; Ord. 10.)

See as to Ord. 60 the notes to Ord. 244, *ante*.

See Judic. Act, O. VI., rr. 4, 5; O. IX., rr. 1, 2.

**524.** At any time during the proceedings before a Master under an order, the Master may, if he thinks fit, require a guardian *ad litem* to be appointed for any infant, or person of unsound mind not so found by inquisition, who has been served with an office-copy of the decree. (1st April, 1867; Ord. 11.)

By Order 537 the Master may appoint the guardian *ad litem*.

**525.** Guardians *ad litem* for infants or persons of unsound mind not so found by inquisition, who shall be served with an office-copy of a decree, are to be appointed in like manner as guardians *ad litem* to answer and defend, are appointed in suits on bill filed. (1st April, 1867; Ord. 12.)

This order seems practically abrogated by Order 587, which gives the Master power to appoint the guardian; and see Judic. Act, O. VI., rr. 4, 5; O. IX., rr. 1, 2.

**526.** A person desirous of appointing a guardian for him to defend a suit, may go before a Judge or Master with the proposed guardian if he thinks fit to do so. But he must satisfy the Judge or Master by affidavit that the proposed guardian is a fit person and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, the Judge or Master may examine the proposed guardian, or the person making the affidavit, *viva voce*, or require further evidence to be adduced until he is satisfied of the propriety of the appointment. (6th June, 1853; Ord. 2.)

**527.** A petition for the sale or other disposition of the real estate of an infant, is to be intituled in the matter of the infant. (3rd June, 1853; Ord. 37, s. 1.)

See notes to R. S. O., c. 40, ss. 76, *et seq.*

**528.** The petition is to be presented, in the name of the infant, by his guardian, or by a person applying by the same petition to be appointed guardian, as hereinafter provided. (3rd June, 1853; Ord. 37, s. 2.)

**529.** The petition is to state the nature and amount of the personal property to which the infant is entitled—the necessity of resorting to the real estate—its nature, value, and the annual profits thereof. It must also state circumstances sufficient to justify the sale or other disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that purpose, and for the appropriation of the proceeds. If an allowance for the maintenance is desired, it must be so prayed, and a case must be stated to justify such an order, and to regulate the amount. (3rd June, 1853; Ord. 37, s. 3.)

**530.** The petition may pray for an appointment of a guardian, as well as for the disposal of the infant's estate. In

that case a proper case must be made by the petition, and established by the evidence, for the appointment of the person proposed. (3rd June, 1853; Ord. 37, s. 3.)

**531.** Upon all petitions for the sale of the infant's estate, the infant is to be produced before a Judge in Chambers, or before a Master. (3rd June, 1853; Ord. 37, s. 5.)

**532.** Where the infant is above the age of seven years, he is to be examined, apart, by the Judge or Master, upon the matter of the petition, and as to his consent thereto, as required by the Statute; and his examination is to be stated to have been taken under this Order, and is to be annexed to and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the Judge or Master before whom he is produced. (3rd June, 1853; Ord. 37, s. 6.)

By R. S. O., c. 40, s. 78, a change has been made as to the age above which the infant is to be examined as to the matter of the petition and his consent thereto. The application now "shall not be made without the consent of the infant, if he is of the age of fourteen years or upwards."

**533.** The witnesses to verify the petition are also to be produced before the Judge or Master, and are to be examined *viva voce* to the matter of the petition, and the depositions so taken are to be stated to have been taken under this Order. (3rd June, 1853; Ord. 37, s. 7.)

**534.** The Masters of the Court are authorized to examine infants and witnesses under the preceding Order, without special order or reference. (3rd June, 1853; Ord. 37, s. 8.)

**535.** Upon a petition so verified, the Court may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case require. (3rd June, 1853; Ord. 37, s. 9.)

**536.** Where, by an order, a day is reserved for an infant defendant to shew cause, it shall not be necessary to issue a subpoena to shew cause against the order, but the plaintiff is to serve the defendant after he attains twenty-one years of age, with an office-copy of the order, indorsed with a notice in the form set forth in schedule W.

See notes to Order 434.

Schedule W is as follows:—

Take notice, that unless you within \_\_\_\_\_ days after the service hereof upon you, shew unto the Court of Chancery for Upper Canada good cause why the

within decree (or order) should not be binding upon you, you will be bound by the said (or order), and the same will stand and be absolute against you.

Dated, etc.

**537.** Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as receivers, as nearly as circumstances will permit. (3rd June, 1853; Ord. 38, s. 2.)

For the mode of appointing a receiver, see Ord. 278 *et seq.*

#### ORDERS OF 23RD FEBRUARY, 1

**584.** Where there is undue delay in prosecuting a reference in the office of the Master in Ordinary or any local Master, he may issue his warrant to the solicitors or parties interested, which may be transmitted by post, calling upon them to shew cause why the reference should not be duly proceeded with. In default of sufficient cause being shewn to excuse the delay, or upon default being made in attending upon the return of the warrant, the Master is to certify to the Court the circumstances of the case; and thereupon the reference in his office is to be deemed closed, and is not to be resumed until further order.

**585.** In all cases under the forgoing Order, the Master may order payment of fees and costs in such manner as he thinks fit.

**586.** Where an appointment fails by reason of the non-attendance of any party, and the Master does not think fit to proceed *ex parte*, he may fix the amount of costs to be paid by the absent party to the party attending upon the appointment.

**587.** The Master may, while proceedings are pending in his office, and where he deems it advisable, appoint guardians *ad litem*; and he may also dispense with service of the decree upon the persons referred to in Order 60; and in such case he is to state the reasons therefor in his report.

See notes to Ord. 244, *ante*.

**588.** Where an order directs the appointment of a receiver, committee of the person and estate of a lunatic, idiot, or person of unsound mind, or a guardian other than a guardian *ad litem*, and does not regulate the matter herein provided for, the Master is to fix the time or times in each year when the person appointed is to pass his accounts and pay his bal-



ances into Court; and in default of compliance with such direction, the person appointed may, on the passing of his accounts, be disallowed any salary or compensation for his services, and may be charged with interest upon his balances.

**589.** In administration suits reports are, as far as possible, to be in the form given in the schedule hereto.

The form of report given is as follows :—

IN CHANCERY.

Between A. B. and others, Plaintiffs,  
and

C. D. and others, Defendants.

[Date.]

Pursuant to the order [or decree] herein made, dated the \_\_\_\_\_ day of \_\_\_\_\_ 1871, having caused an office-copy thereof to be served upon [give the names of persons served under Order 60, and also the names of those upon whom service has been dispensed with, and the reason for dispensing with service], I proceeded to dispose of the matters referred to me, and thereupon was attended by the solicitors for all parties interested [or as the case may be].

[If the Master has appointed a guardian *ad litem* for any of the parties, this should be so stated, and the reason why such appointment was made.]

and I find as follows :—

1. The personal estate not specifically bequeathed of the testator come to the hands of the executors, and wherewith they are chargeable, amounts to the sum of \$ \_\_\_\_\_ and they have paid, or are entitled to be allowed thereout, the sum of \$ \_\_\_\_\_ leaving a balance due from them [or "to them," as the case may be,] of \$ \_\_\_\_\_ on that account.

[If no personal estate, say : No personal estate has come to the hands of the executors, nor are they chargeable with any.]

2. The creditors' claims sent in pursuant to my advertisement in that behalf published in \_\_\_\_\_ issues of the newspaper called \_\_\_\_\_, and which have been allowed, are set forth in the first schedule hereto, and amounts altogether to \$ \_\_\_\_\_

[If no creditors, say : No creditor has sent in a claim pursuant to my advertisement in that behalf, nor has any such claim been proved before me.]

3. The funeral expenses of the testator amounting to \$ \_\_\_\_\_ have been paid by the executors and are allowed to them in the account of personal estate.

4. The legacies given by the testator are set forth in the second schedule hereto, and with the interest therein mentioned, remain due to the persons named [or as the case may be].

5. The personal estate of the said testator outstanding or undisposed of is set forth in the third schedule hereto.

[In this third schedule the personal estate specifically bequeathed should be set forth separately from the other personalty outstanding or undisposed of. If there is no specific bequest, it should be so stated in the body of the report.]

6. The real estate which the said testator was seised of or entitled to, and the encumbrances (if any) affecting the same, are set forth in the fourth schedule hereto.

7. The rents and profits of the testator's real estate received by the said executors, or with which they are chargeable, amount to \$ \_\_\_\_\_ and they have paid, or are entitled to be allowed thereout, the sum of \$ \_\_\_\_\_ leaving a balance due from [or to] them of \$ \_\_\_\_\_ on that account.

[If no rents, etc., received, say : No rents and profits have come to the hands of the said executors, nor are they chargeable with any.]

8. I have allowed to the said executors the sum of \$ \_\_\_\_\_ as a compensation for their personal services in the management of the said estate.

All of which, etc.



## ORDERS OF 10TH JANUARY, 1879.

**638.** Any adult person entitled to apply, under Orders 467 or 471, for an administration order may apply to the Master in the County Town of the County (other than the County of York) where the deceased person whose estate it is desired to administer resided at the time of his death; and such Master may, on 14 days' notice being given to the person or persons entitled under the present practice to notice of such an application, make an order for the administration of, and proceed to administer, such estate in the least expensive and most expeditious manner.

This order is confined to applications made by adult persons, and so is more limited in its application than Order 467. Where an administration of an estate is sought on behalf of an infant, or where the person whose estate is to be administered died in the County of York, or in any County where there is no local Master—the application must be made in Chambers, or, when necessary, upon bill filed for that purpose.

As to the persons to be served and the mode of proceeding to obtain an administration order, see notes to Ord. 467.

For form of order for administration to be made by a local Master, see Judic. Act, Appendix of Forms, No. 171.

**639.** Such Master shall have full power to deal with both the realty and personalty of the estate, the subject of administration, and shall dispose of the costs of the proceedings, and shall finally wind up all matters connected with such estate, without any further directions, and without any separate, interim, or interlocutory reports, or orders, except where the special circumstances of the case call therefor; and in so doing he shall be guided by the practice heretofore had in the administration of estates upon an application made in Chambers for an administration order: Provided always, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of the Judge in Chambers or the Court, and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper.

The object of this order is to do away with the necessity of a hearing on further directions in administration suits; the order to be made by the Master ought therefore to cover all those directions which, by the former practice, were usually made on the hearing on further directions, except the order for payment of the fund out of Court; e.g., the Master may properly order any balances found in the hands of accounting parties to be paid into Court, he may also properly direct a sale of the land, the payment of the purchase money into Court, the settlement of conveyances and the execution thereof by all proper parties, and he may also properly appoint some person to execute such conveyances for infants or other persons not *sui juris* who are incapable of executing the same themselves. The Master has also power

1879.

under Orders 467  
ly to the Master  
an the County of  
e it is desired to  
and such Master  
person or persons  
of such an appli-  
of, and proceed  
ensive and most

ns, and so is more lim-  
stration of an estate is  
estate is to be adminis-  
here is no local Master  
cessary, upon bill filed

ding to obtain an ad-  
cal Master, see Judic.

o deal with both  
subject of admin-  
proceedings, and  
with such estate,  
at any separate,  
except where the  
for; and in so  
before had in the  
made in Cham-  
always, that all  
nce be paid into  
d or paid out for  
dge in Chambers  
order, the Judge  
ter his report or  
roper.

f a hearing on further  
ne Master ought there-  
ce, were usually made  
yment of the fund out  
found in the hands of  
ly direct a sale of the  
ement of conveyances  
also properly appoint  
persons not *sui juris*  
Master has also power

to make any order or report which may be necessary for completely winding up the estate or protecting the rights of the parties to the suit. The words "without any separate or interlocutory reports, or orders, except so far as the special circumstances of the case may require," indicate that it is only unnecessary orders or reports that are dispensed with, but that so far as such interlocutory reports or orders may be essential to the winding up of the estate, the Master is to have the power to make them. The drawing up and issuing of many orders may be avoided by acting under Order 231, which provides that a party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master without any warrant or written direction served for that purpose. The provisions of that order of course only apply when the party attends the Master in person or by solicitor and has notice of the direction.

The only order which the Master is precluded from making in suits for administration, or partition, in which he has issued a decree, is that for the payment out of the money in Court; as to the distribution of the fund, it would seem to be intended that the Master should state the amount of the commission and what he finds would be a proper apportionment thereof among the different solicitors under Order 643, and also the amounts he finds payable to creditors, and other beneficiaries, respectively.

The order for payment is to be made by a Judge or the Court. Application for this order is to be made in Chambers on a Monday (Ord. 590): the application is to be made upon notice, and it would seem that all persons who, under the former practice, would be entitled to notice of a hearing on further directions, would be entitled to notice of such an application.

Under the ordinary administration decree, it has been held that the Master may take an account of timber cut with which a defendant is chargeable, *Stewart v. Fletcher*, 18 Gr. 21; and may also without any special directions take evidence and report the facts as to payments made by executors for the maintenance and education of infant beneficiaries, *Stewart v. Fletcher*, 16 Gr. 235. The Master would have similar powers under a decree issued by himself, he would also be entitled to make all proper allowances to executors, administrators, and trustees, by way of compensation for their services.

Where a legacy is given to executors as compensation for their trouble, they are at liberty to claim a further sum under the statute if the legacy be an insufficient remuneration, *Denison v. Denison*, 17 Gr. 307; see, however, *Kennedy v. Pingle*, 27 Gr. 305. Where a suit was brought by an executor unnecessarily the Court refused to allow him any commission, *Graham v. Robson*, 17 Gr. 318. An executor, not being a trustee of the realty, is not entitled to receive the rents thereof, and if he do, he is a mere intermeddler and not entitled to any compensation in respect of such rents, *Dagg v. Dagg*, 25 Gr. 542.

An order may, when necessary, be obtained under Ord. 640, combining with the order for partition one for administration.

**640.** Any adult person who has heretofore been entitled to a decree or order for the partition of an estate, may, on serving one or more of the persons entitled to a share of the estate of which partition is sought, with a 14 days' notice of motion, apply to the presiding Judge in Chambers, or to the Master in the County (other than the County of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; whereupon such Judge or Master may make such order for partition or sale, or such other order as may be proper, and the Master shall thereupon proceed in the least expensive and most expeditious manner, according to the practice now in force, for the partition or sale of the premises, the ascertainment of the rights of the various persons interested, the adding parties, the

taxation and payment of costs, and otherwise: Provided always, that where an infant is interested in the estate, no order shall be made for partition or sale until such infant is represented by its guardian *ad litem*; and provided also that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of the Judge in Chambers or the Court; and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper.

This Order is also confined to the case of suits instituted by adult persons; where an infant institutes a suit for partition a bill must be filed. This order extends the principle of Order 58 to partition suits; formerly it was necessary to make all tenants in common of the land in question parties to the bill; under this order it will suffice to notify one or more of such persons. Where the interests are unequal the person having the largest interest should, as a general rule, be notified of the application. In ordering a partition or sale the Court will be guided by what is best for the interests of all parties, *Blasdel v. Baldwin*, 3 App. R. 6.

Wherever an account is required from any person, such person should be made a defendant in the first instance, as it would seem doubtful whether parties served with the decree in the Master's office can be made to account thereunder, *Walker v. Seligmann*, L. R. 12 Eq. 152; and see *Hopper v. Harrison*, cited in notes to Ord. 244.

The plaintiff was formerly bound to allege, and if disputed, to prove, his title, and under this order it will still be necessary that the affidavits in support of the application should establish the applicant's title, and it would also appear to be necessary to shew thereby the estates and interests of all other persons interested as joint owners. The Court will not decree partition of lands, for which no patent has issued, neither will it decree a sale of such lands at the instance of the representatives of a deceased locatee, *Abell v. Weir*, 24 Gr. 464.

Where there is no Master resident in the County where the lands lie or where they are situate, in the County of York, or in more Counties than one, the application for partition should be made to a Judge in Chambers. The new jurisdiction, here conferred on a Judge in Chambers, cannot be exercised by the Referee in Chambers, see Ord. 560; the latter's powers are limited to those matters which on the 23rd of February, 1871, were done or transacted by a Judge sitting in Chambers, see *Queen v. Smith*, 7 P. R. 429; *Re Arnott, Chatterton v. Chatterton*, 8 P. R. 39.

Where two or more orders are made for partition of different parts of the same person's estate, the proceedings may be consolidated under Ord. 641.

By this Order the Master is empowered to make such a decree as the Court has heretofore been accustomed to make in partition suits—except the order for payment of the money out of Court, see note to Ord. 639. For the form of decree which is to be made, see *Judic. Act, App. of Forms*, No. 172.

All parties interested in the land who are not served with the notice of motion for the decree ought to be served with an office copy of the decree, Ord. 244. As to such service, see Ord. 244 and notes. When the defendant in possession claimed to be entitled absolutely by possession under the Statute of Limitations, proceedings under this Ord. 640, were stayed, and the plaintiff directed to file a bill, *Re McMillan, Patterson v. McMillan*, 17 U. C. L. J. 86.

**641.** When after an order has been made under Order 640, lands are discovered in another County, an application may be made to a Judge in Chambers for the partition or sale of such lands under the order formerly made, and where two or more

wise: Provided in the estate, no such infant is provided also that once be paid into and or paid out for Judge in Chambers order, the Judge enter his report or proper.

ted by adult persons; e filed. This order ex- ly it was necessary to to the bill; under this Where the interests are a general rule, be noti- Court will be guided by in, 3 App. R. 6.

person should be made whether parties served at thereunder, Walker son, cited in notes to

ted, to prove, his title, avits in support of the ould also appear to be her persons interested is, for which no patent instance of the repre-

the lands lie or where s than one, the applica- The new jurisdiction, ised by the Referee in those matters which on y a Judge sitting in tatterton v. Chatterton,

erent parts of the same Ord. 641.

decree as the Court has ept the order for pay- or the form of decree 2.

h the notice of motion the decree, Ord. 244. defendant in possession Statute of Limitations, intiff directed to file a 36.

under Order 640, application may be on or sale of such here two or more

orders have been made by Masters in different Counties, an application may be made in Chambers for an order as to the conduct of the future proceedings.

The object of this order is to prevent more than one suit being brought in respect of the same estate. After an order for partition of lands in the County of Peel had been made by a Master under O. 641, an order was made by a Judge in Chambers to include in the first order lands in another County, though such lands were known of at the time the partition order was made, and the costs of the application were allowed, exclusive of the usual commission under O. 643, *Clarke v. Clarke*, 8 P. R. 156. Where more than one suit is brought, under this order application may be made to consolidate them. The costs of the suit which is stayed are *prima facie* payable out of the estate *pari passu* with the costs of the suit which is carried on, see *re Clark, Cumberland v. Clark*, L. R. 4 Ch. App. 412.

**642.** There shall be an appeal to the presiding Judge in Chambers—on any day that he may sit in Chambers—against any decree, order, report, ruling or other determination of any Master; the notice of such appeal shall be a seven days' notice, and shall set out the grounds of objection, and the appeal shall be set down for argument not later than the Saturday preceding the day on which it is to be argued, and shall be brought on for argument within a month—not including vacation—of the making of such decree, order, report, ruling or determination, or within such further time as a Judge may think proper, and the presiding Judge may then hear, or adjourn into Court, or otherwise dispose of such matters on such terms as he thinks proper.

This order works an important change in the practice. All appeals from Master's reports are now to be brought on in the first instance before a Judge in Chambers, who has power to adjourn any case he may think proper into Court.

Under Order 252 a report became absolute without an order confirming the same at the expiration of fourteen days from the filing thereof, unless previously appealed from. Under Order 642 the time for appealing is altered, and dates from the making and not the filing of the report. No report which requires confirmation, therefore, now becomes absolute until a month has elapsed from its date and fourteen days from the filing, *re Eaton, Byers v. Woodburn*, 8 P. R. 289; and if any proceedings are required to be taken thereunder before the expiration of the month, it would require a special order confirming it. An order for confirmation before the lapse of the month would as a general rule, only be made on consent of, or notice to, all parties interested therein and entitled to appeal therefrom.

Power is reserved to a Judge to extend the time for appealing under this Order, so as to meet the case of parties who are not notified of the order, report, etc., until after the time limited for appealing therefrom has expired, or so nearly expired as to prevent the party from prosecuting the appeal within the limited time. But the Court will not extend time merely on account of ignorance of practice, *Blaylock v. McFarlane*, 15 U. C. J. L. 137.

This order applies to all orders made by Masters, and supersedes therefore the provisions of Order 591, so far as it relates to appeals from orders made by Masters.

Instead of moving in Court to discharge a decree or order made by a local Master, and which is served under Orders 60 or 244, the practice would seem now to be to appeal therefrom under this order. The notices required by schedules A and L to the Con. Orders would, therefore, in such cases, require to be modified, but where a decree or order served under Orders 60 or 244 is not made by a local Master, the practice as to moving to vary, or set it aside remains as formerly.

It will be observed that Orders 638 and 640 empower the local Masters to make an order for administration, or partition, or sale, but the power to make decrees in mortgage suits is given to the Deputy Registrars. This distinction must be carefully borne in mind, for although most of the local Masters are also Deputy Registrars, yet some of them are not; it is also to be noted that it is only decrees or orders granted by Masters that are appealable under Order 642.

A motion to set aside a decree obtained on *præcipe* and for leave to answer, may be made in Chambers (*Kline v. Kline*, 3 Ch. Ch. R. 79.), or such a decree may be varied on petition, a rehearing in such cases being unnecessary, *Nelles v. Vandyke*, 17 Gr. 14; see also *Simmers v. Erb*, 21 Gr. 289.

**643.** In all suits hereafter instituted for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff now in force, each person properly represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the suit—shall be entitled to his actual disbursements in the suit, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned, in the suit, which commission shall be apportioned amongst the persons entitled to costs, as the Judge or Master thinks proper. Such commission shall be as follows:—

On sums not exceeding \$500.....	20	per cent.
For every additional \$100 up to \$1,500..	5	" "
For every additional \$100 up to \$4,000..	3	" "
For every additional \$1,000 up to \$10,000	2½	" "
For every additional \$1,000.....	1	" "

and such remuneration shall be in lieu of all fees, whether between "party and party," "as between solicitor and client," or "between solicitor and client."

The commission payable under this order is divisible only between those who are strictly parties to the suit, properly represented by a solicitor, and entitled to costs out of the estate. Persons not originally made parties to the suit, but served with a copy of the decree under Ord. 60, are not thereby made parties to the suit, but are merely enabled to attend the proceedings, and are bound thereby as though they were actually parties, *English v. English*, 12 Gr. 441. In a suit by a residuary legatee, the plaintiff sufficiently represents the other residuary legatees, and they are not entitled as of course to costs out of the estate occasioned by their appearing by another solicitor in the Master's office, *Gorham v. Gorham*, 17 Gr. 386. Creditors who are neither plaintiffs nor defendants are also excluded from participation in the commission, and their costs will be disposed of as formerly. The commission is to cover both the solicitor's fees and the fees to counsel. It is of course not intended to cover costs ordered to be paid by one party to another. It is intended to cover only costs payable out of the estate. The commission should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by and the responsibility imposed upon them. Objections to the commission allotted, may be raised on a motion for distribution without previous notice of appeal being given, *Dodge v. Clapp*, 8 P. R. 388.

Where the principal part of the costs of a suit are ordered to be paid personally by one or more of the parties, and the costs of only a small proportion of the work done, are chargeable against the estate, it does not appear that in such a case the full amount of the commission here provided would be payable, and the power



reserved to the Judge to make other order would probably be exercised. Cases might arise where from special circumstances the commission here provided would be clearly inadequate, and in such cases too it would be possible that the power to make other order as to the costs would be exercised.

**644.** When two or more suits are instituted for administration, or partition, or sale, the Judge may, in his discretion, disallow all, or any, of the costs of any suit or suits, which in his opinion has or have been unnecessarily prosecuted.

By Ord. 308 the Master is directed not to allow a party on taxation any costs which do not appear to have been necessary or proper for the attainment of justice or for the defending his rights, or which appear to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party; and under Ord. 315 unnecessary costs occasioned by defendants severing in their defence are to be disallowed. Under the present order the whole costs of a suit may be disallowed if it has been commenced or prosecuted unnecessarily, and not only the costs of the plaintiff but those of defendants as well, the latter having power under Ord. 641 to prevent the prosecution of more than one suit.

**645.** Order 434 shall apply to cases in which an adult is interested in the estate as well as an infant, and also to suits for redemption.

Order 434 was held to apply only to cases where all the defendants were infants. Where there were adult defendants, as well as infants, the order was held not to apply, and such suits had consequently to be set down for hearing in Court, *Fulleton v. Keely*, 9 U. C. L. J. N. S. 54. The present order was passed so as to enable such suits to be disposed of before the Referee in Chambers.

**646.** Order 435 shall apply to redemption suits: and under Orders 434 and 435 there may be granted, where it is prayed for, and notice is given in pursuance of Order 647, a decree embracing the additional relief which this Court is entitled, under "the Administration of Justice Act" to give, in mortgage cases, on the hearing of the cause *pro confesso*, and such a decree may be granted, notwithstanding that the defendant has been served by publication, or otherwise, or is a corporation: Provided always that where the bill has not been personally served, the claim of the plaintiff shall be duly verified by affidavit.

By this Order the power of the Registrar to issue decrees on *præcipe* is extended to redemption suits, Order 436 having previously restricted that power to suits for foreclosure or sale.

To obtain the additional relief referred to in this Order, it must be prayed for in the bill, and the office copy of the bill served on the defendant must have been endorsed with the additional notice required by Order 647. Where an order for payment is required the bill should allege facts shewing the personal liability of the defendant. The order for payment cannot be made unless the defendant have by covenant or otherwise made himself personally liable for the debt, *Christie v. Dowker*, 10 Gr. 199; 10 U. C. L. J. 161. Where the defendant is merely the owner of the equity of redemption as assignee of the original mortgagor, and has entered into no covenant or agreement to pay the mortgage debt, an order for payment cannot properly be made against him, but where the original mortgagor is a party and is legally bound to pay the debt, he may be ordered to pay it, notwithstanding that he may have conveyed away his equity of redemption to a co-defendant.

Where an order for delivery of possession is prayed the bill should shew who is in possession, and also the plaintiff's right to have immediate possession.

**647.** In suits for foreclosure or sale, where the plaintiff prays for an order for the immediate delivery of possession, or for an order for immediate payment against a defendant, he must, in addition to the notice required by Schedule S, endorse upon the office copy of the bill served upon the defendant, the further notice :

*(Where order for immediate possession prayed.)*

"And the plaintiff will be entitled to an order for the immediate delivery of possession of the mortgaged premises to him."

*(Where order for immediate payment prayed.)*

"And the plaintiff will be entitled forthwith to execution against the goods and lands of you (*naming the defendant against whom the plaintiff is entitled to this relief*) to recover payment of the amount due by you."

For indorsements on writs in mortgage suits, where immediate possession or payment is desired, see Judic. Act O. III., r. 7; appendix of Forms, No. 9, (d) & (e).

**648.** Every Deputy-Registrar shall have the same power, as to the issue of decrees on *præcipe*, as by Order 646, and the Consolidated General Orders, is given to the Registrar of the Court.

As to issuing a decree on *præcipe* in a mortgage suit, see Judic. Act, O. IX., rr. 10, 11. The decree will be drawn up upon *præcipe* upon proof of service of the writ duly indorsed.

Under Order 435 the Registrar has power to issue on *præcipe* any decree in mortgage cases that the Court would previously to that Order have made upon a hearing *pro confesso*, *Kirkpatrick v. Howell*, 22 Gr. 94.

Where the defendant has been served by publication, proof of the plaintiff's claim must be adduced, see Order 646. In other cases no affidavit is required from the plaintiff proving his claim, but the account is to be taken on the basis of the special indorsement. Where, however, the plaintiff, as is sometimes the case, admits that he has made an indorsement for more than is actually due, it should be stated in the decree that he abandons the excess claimed by the indorsement, and only the balance should be ordered to be paid.

**649.** Every decree or order hereafter made by the Court, whether the service of the bill, or other proceedings on the defendant, has been personal, by publication, or otherwise, shall be absolute in the first instance, unless the Court shall otherwise order.

This Order creates an important change in the practice: formerly a decree founded on an order *pro confesso*, in cases where the defendant had not been served



the plaintiff  
of possession, or  
defendant, he  
Schedule S,  
upon the de-

personally, and had not appeared at the hearing, was merely a decree *nisi* and required to be made absolute under Order 114 *et seq.* Under Order 649 all decrees are to be absolute in the first instance, unless the Court otherwise order.

Where the decree is granted on *procipe* against a defendant who has not been personally served with the bill, the plaintiff's claim is required to be verified by affidavit (Order 646); and it would seem probable that the same rule would be followed in causes heard in Court.

**650.** The Local Masters and Deputy-Registrars shall enter in a book or books, kept for that purpose, all decrees or orders made by them, and they shall, on the conclusion of every suit or matter, annex together all the pleadings and papers, filed with them in such suit, or matter, and transmit the same to the Clerk of Records and Writs, who shall duly enter and file the same.

prayed.)

er for the im-  
ed premises to

prayed.)

n to execution  
the defendant  
(lief) to recover

mediate possession or  
t of Forms, No. 9,

the same power,  
er 646, and the  
Registrar of the

Judic. Act, O. IX.,  
proof of service of the

*procipe* any decree in  
have made upon a

of of the plaintiff's  
avit is required from  
on the basis of the  
sometimes the case,  
ally due, it should be  
ne indorsement, and

e by the Court,  
ings on the de-  
otherwise, shall  
urt shall other-

formerly a decree  
had not been served

## PROCEEDINGS IN ADMINISTRATION SUITS.

### PARTIES.

#### 1. PLAINTIFFS.

It is competent to the following persons to make application for administration:—

(a) A specific, pecuniary or residuary legatee, or next of kin; G. O. Chy. 58, r. 1.

(b) A legatee interested in a legacy charged upon real estate, or a person interested in the proceeds of real estate directed to be sold; G. O. Chy. 58, r. 2.

Application for administration order, made within a year from death of testator, but uncorroborated, refused, *Vivian v. Westbrooke*, 19 Gr. 461; nevertheless an action to administer the estate, can be instituted at any time after the death of the testator, *Prosser v. Mossop*, W. N. (1881) 38; but see *Slater v. Slater*, 3 Ch. Ch. r. 1.

(c) A residuary devisee or heir; G. O. Chy. 58, r. 3.

Where residuary devisees had died abroad before the institution of the suit, and were made parties, in ignorance of their death, the suit was proceeded with, without making their real representatives parties, *Bateman v. Cook*, 1 W. R. 242.

As to making several of a numerous class represent the class, both as plaintiffs and defendants, see *Bromley v. Williams*, 32 Bevan 177; *Gorham v. Gorham*, 17 Gr. 386; also *Judicature Act*, O. XII., r. 11.

(d) One of several *cestuis que trust* under a deed or instrument for the execution of the deed or instrument, G. O. Chy. 58, r. 4.

Decree for the appointment of new trustees and conveyance of the trust estate in the suit by some of the *cestuis que trust*, and a direction to serve the others with notice of the decree, *Jones v. Jones*, 9 Ha. app. 80.

Money recovered from a trustee in a suit by *cestui que trust* to repair breach of trust as to one share of the trust estate, *McLeod v. Annesly*, 16 Beav. 600.

If the whole fund be not forthcoming, owing to a breach of trust, a party entitled to a moiety, although ascertained, cannot sue for payment without making the person entitled to the other moiety a party, *Lanaghan v. Smith*, 2 Phil. 801; *Munch v. Cockerell*, 8 Sim. 219.

Where *cestuis que trust* have by their conduct made themselves trustees, they ought to be parties, *Jesse v. Bennett*, 6 D. M. & G. 609. Strangers who have aided in misapplying funds, are proper parties, *Lund v. Blanchard*, 4 Ha. 9.

(e) One person on behalf of himself and of others in the same interest in cases of suits for the protection of property pending litigation, and in cases of the nature of waste, G. O. Chy. 58, r. 5.

(f) An executor, administrator or trustee, G. O. Chy. 58, r. 6.

The personal representative may file a bill as a creditor simply, upon a testator's estate, against a devisee of lands under the will, after the personalty is exhausted, and obtain a decree as an ordinary creditor, *Tiffany v. Tiffany*, 9 Gr. 158.

Trustees and executors stand in a different position from creditors or *cestuis que trust* as to the right to have the estate administered, and cannot, without shewing material difficulty, ask for administration, *Cole v. Glover*, 16 Gr. 392; *McGill v. Courtice*, 17 Gr. 271.

The application for administration by an executor will be refused where apparently unnecessary, *Barry v. Barry*, 19 Gr. 458; an executor will be charged with the costs of a suit for administration unnecessarily instituted, *Id.*

Deficiency of assets by which all creditors become entitled to share *pari passu* entitles an administrator to apply, *Swetnam v. Swetnam*, 10 U. C. L. J. N. S. 135.

(g) An assignee of a chose in action, without making the assignor a party, G. O. Chy. 58, r. 7.

(h) A creditor upon an estate.

Where the plaintiff had, at the request of the mother or natural guardian of the infant heirs, advanced money to pay the debts of their ancestor, to save costs of suit therefor, he was held entitled to sustain a suit for administration as a creditor, *Glass v. Munsen*, 12 Gr. 77.

In consequence of the wording of Orders 638-9, the Master in Ordinary has no such jurisdiction as thereby is conferred upon the Local Masters, and therefore, in the case of an order for the administration of the estate of a deceased person in the County of York, the applicant is relegated to the former practice and should set down the cause on further directions, in order to obtain the sanction of the Court for the sale of the lands.

A married woman filing a bill, in respect of real estate, must do so by a next friend or alone, according to whether the date of her marriage was prior or subsequent to 2nd March, 1872, R. S. O. c. 125, s. 4; but see the original Act, 35 Vic., c. 16, s. 1, where the distinction does not turn upon the date of the marriage and *quere* as to property acquired between the passing of that Act and the Revised Statutes, *Abel v. Weir*, 24 Gr. 464; *Godfrey v. Harrison*, 8 P. R. 272, where the question does not seem to have been raised as to property acquired between 35 Vic., c. 16, s. 1, and the passing of the R. S. O.; see notes to Judicature Act, O. XII., r. 9.

Where the personal representative makes application for the administration of the personal estate the application can be granted *ex parte*, per Esten, V.-C., *re Dunlevy*, see Order Book II, fo. 778; *re Ette*, 6 F. R. 159; *re Bromley*, V.-C. B., 20 January, 1878.

A decree for administration cannot be made in the absence of a personal representative as against an executor named in the will who has not taken out letters probate, *Rowsell v. Morris*, L. R. 17 Eq. 20.

Where a party, in addition to a declaration of the true construction of a will, is entitled to ask as consequential thereto the administration of the estate, the case is within G. O. 538; *Murphy v. Murphy*, 20 Gr. 575.

Where there are more than one personal representative all must be notified, notwithstanding that one is resident out of the jurisdiction, *Freeborn v. Carroll*, 6 P. R. 188.

## 2. DEFENDANTS.

Under Orders 638-9, the parties defendant who should be notified are:

(a) In any event the personal representative.

Where there is no personal representative and where by the strictest proof it is shewn that the personal estate is nominally or virtually *nil*, it has been held that

under R. S. O., c. 49, s. 9, upon motion for an order for administration before a Judge in Chambers, an administrator *ad litem* may be appointed, *re* Horton, per V.-C. Proudfoot.

If infants are made parties to the notice of motion, and consequently parties to the order, it is necessary to issue an order appointing a guardian *ad litem*, and to serve the requisite notice of motion. See as to service upon the official guardian under the Judicature Act, O. VI., r. 4.

(b) Heir-at-law must have notice if it is desired to deal with the realty, G. O. Chy. 472.

In creditor's bill against the devisees of a debtor it is not indispensable that the heir-at-law should be made a party, *Fenny v. Priestman*, 1 Gr. 133.

Where a trustee commits a breach of trust, the person participating in it is not a necessary party to a suit for the general administration of the trust estate, *Tiffany v. Thomson*, 9 Gr. 244.

### 3. PRACTICE AND PROCEDURE.

By the Judicature Act, O. I., r. 3, the Orders of the Court of Chancery, Nos. 467-487, 638-650, are to be applicable to all Divisions of the High Court of Justice. See these Orders, *ante*.

*Application, how made.*—Application for administration should be made upon a fourteen days' notice of motion, returnable before the Master in the county in which the deceased person resided at the time of his death; or, in the event of such residence being within the County of York or there being no Master's office in an outer county, to a Judge in Chambers, G. O. Chy. 638.

Orders 638-9 apply to simple cases only and to applications made by adults; where administration is sought on behalf of an infant, or where the person whose estate is to be administered resided in the County of York or in any county where there is no local Master, the application must be made in Chambers or, where necessary, by action.

As to the application by the personal representative, where there is a deficiency of assets to pay debts, see *re Ette*, 6 P. R. 159; *re Shipman*, Wallace v. Shipman, 24 Gr. 177; *Swetnam v. Swetnam*, 6 P. R. 149; *Marsh v. Marsh*, 7 P. R. 129; *re Jack*, Jack v. Jack, 13 U. C. L. J. 358; but an executor cannot institute suit for administration for the sole purpose of indemnification by passing his accounts, *White v. Cummins*, 3 Gr. 602; *Cole v. Glover*, 16 Gr. 392; *Barry v. Barry*, 19 Gr. 438; and so doing, may be refused his costs of a suit unnecessarily brought, *Graham v. Robson*, 17 Gr. 318; or may be ordered to pay costs if the suit appears to have been improperly instituted, *McGill v. Courtice*, 17 Gr. 271; *Sullivan v. Sullivan*, 16 Gr. 94.

If the guardian *ad litem* makes no objection to unnecessary proceedings, no costs are given, either to the executors or to the guardian, *Springer v. Clark*, 15 Gr. 664.

For form of notice of application for administration order, see Judicature Act, Forms, No. 12.

*Bill or action.*—Orders 467 & 438 apply to simple cases only, *Barry v. Brasil*, 1 Ch. Ch. 248; *re Forster*, Griffith v. Foster, 20 Gr. 345; *Nudel v. Elliott*, 1 Ch. Ch. 326; *Cameron v. McDonald*, in *re McDonald*, 2 Ch. Ch. 29.

If the Statute of Limitations or a question of title is to be raised by any of the parties, a bill should be filed, *McDonald v. McGillis*, 8 P. R. 339; and generally if the rights of the parties are such as to require pleadings to raise them, the case is not within the jurisdiction of the local Master, *Laidlaw v. Jackes*, 22 Gr. 171; 25 Gr. 293.

*Material for motion—Notice—Service.*—It is necessary upon motion, under Order 638, to prove by affidavit the *status* of the applicant, and his reason for making the application; *e.g.*, the death and either (a) the testacy of the deceased person, whose estate it is desired to administer, and the material provisions of the will, the executors or personal representative, or (b) the intestacy which must be proved by affidavit made by a competent person, such as the widow or other member of the family, that search has been made for a will, and that no will has been found. It is not a matter of course that the Court of Chancery will accept a proof of intestacy



And it is ordered that further directions and the question of costs be reserved until after the said shall have made his report.

And the said is to make his report within months from the date hereof.

In the case of an intestate:—

Upon the application of the above named it is ordered that the following accounts and inquiries be taken and made by the of this Court that is to say:

1st. An account of the personal estate of deceased, the intestate in the proceedings named come to the hands of or to the hands of any other person or persons by order or for use.

2nd. An account of the said intestate's debts.

3rd. An account of the said intestate's funeral expenses.

4th. An inquiry, what parts, if any, of the said intestate's personal estate are still outstanding or undisposed of.

And it is ordered that the said intestate's personal estate be applied in payment of his debts and funeral expenses in a due course of administration.

And it is ordered that the following further accounts and inquiries be taken and made by the said that is to say:

5th. An inquiry what real estate the said intestate was seised of or entitled to at the time of his death.

6th. An inquiry what incumbrances affect the said intestate's real estate.

7th. An account of the rents and profits of the said intestate's real estate, received by the said or by any other person or persons by order or for use.

8th. And the said Master is to inquire and state who are the proper persons entitled to share in the real and personal estate of the said intestate, and in what proportions.

And it is ordered that further directions and the question of costs be reserved until after the said shall have made his report.

And the said Master is to make his report within months from the date hereof.

For form of an order to be made by a Local Master, see Judicature Act, Forms, No. 171.

*Proceedings in the Master's Office.*—See the G. O. Chy. 211-251, 474-487, and the notes to these Orders, *ante*.

By O. XII., r. 26, of the Judicature Act, in any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The Judge may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit.

*Master's Report and appealing therefrom.*—See as to the time for appealing from a report generally, G. O. Chy. 253 and notes, and see page [229], *ante*.

The general object of the Orders of 10th June, 1879, was to simplify and economize litigation, and it has been already held by the Judges that the following among other objections to a Master's report may be raised upon motion for distribution before a Judge in Chambers, under Order 639, without previous notice of appeal having been given:—

(1) Correctness of the Master's ruling as to right to dower or tenancy by the curtesy of any party to the suit;

(2) The award by the Master of a sum in gross or an annual sum to such dowress or tenant by the curtesy. Under the "Dower Act of 1879," 42 Vic., c. 22, s. 5, it is discretionary with the Court to allow a sum in gross, or an annual sum; and, with regard to dower, it is the practice to allow an annual sum, or in

other words, the interest upon one-third of the proceeds of the sale of realty rather than a sum in gross, unless in exceptional circumstances, or in the case of a consent by the dowress to accept a less sum than the amount fixed by the annuity tables.

In the case of a tenant by the curtesy, the Court will, under no circumstances, allow a gross sum in full, and *semble* in the case of a life interest, as *e.g.*, a mother entitled to a life estate in deceased's child's share, *Allan v. Kennedy*, the Chancellor, 2 Sept., 1880.

Where the time for appealing has elapsed, the Court may, under special circumstances, give leave to appeal, but such leave to appeal can only be obtained upon motion, notice of which has to be given, *Cozens v. McDougall*, 1 Ch. Ch. R. 29; *Larkin v. Armstrong*, 1 Ch. Ch. R. 31; *Cade v. Newhall*, 1 Ch. Ch. R. 200. As to what should be shewn on special application, see *Thomson v. Walker*, 1 Ch. Ch. R. 256; and see notes to sec. 38 of the Judicature Act.

A clerical error in the Master's Report apparent on the face of it can be corrected on an *ex parte* application, *White v. Courtney*, 1 Ch. Ch. R. 11; *Watson v. Moore*, 1 Ch. Ch. R. 266.

After the Master has signed his report he is *functus officio*, and no certificate by him as to any omission or mistake can be used, unless by the direction of a Judge, *Rosebatch v. Parry*, 27 Gr. 193.

Upon an appeal from a Master's report, the general rule is that the Court will not consider the weight of evidence taken before the Master, *Day v. Brown*, 18 Gr. 681; and see *Livingstone v. Wood*, 1 Can. L. T. 267; but, for a modification of this doctrine, see *Blake v. Kirkpatrick*, 1 Can. L. T. 267.

Where a report is appealed from and some of the grounds allowed, and the report referred back to be reviewed, an appeal will not lie against the further report therein for matters disposed of by the first report, and not objected to on the original appeal, *Ross v. Perrault*, 13 Gr. 206.

A report can be confirmed upon a consent of all parties by order of a Judge, but the order will not be made where any of the creditors have proved claims without their consent also.

It may also be here incidentally observed that under an administration decree made by a local Master the Referee has no power to disburse with payment into Court by a purchaser, such order can only be made by a Judge when or after the report comes before him for review in accordance with Order 639.

Upon the objection of any of the parties, the report before whom the report comes for review, will order the Master's apportionment of the commission to be revised by the Master-in-Ordinary, and all pleadings and papers in the suit being, under Order 650, sent to the Clerk of Records and Writs, they are carried into the office of the Master-in-Ordinary upon request from him, *Campbell v. Campbell*, 8 P. R. 159; *Dodge v. Clapp*, 8 P. R. 388.

*Sale of realty only in case of necessity.*—It should be observed that the practice in administration suits, as it existed prior to 9th January, 1879, is in no wise altered by the General Orders of that date, 638-651. Owing to the general wording of Order 639 it might be inferred that the Master has power to realize by sale, or otherwise dispose of the whole estate, real or personal, but this is not so; the personality must, as heretofore, be exhausted in payment of debts and costs of suit before the realty can be approached, and then only so much of the realty can be disposed of as may be necessary to supply the deficiency, if any. If the object be to wind up and finally dispose of the estate, including lands not required for payment of debts, the proceedings should be instituted under Order 640, and Orders 638 and 639, as analogous to a bill filed under the former practice for partition and administration.

O. XLVI., r. 8, of the Judicature Act provides that where the trusts of any will or settlement are being administered, and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the Judge shall otherwise direct.

*Costs.*—In case of deficiency of assets, and where proceedings have resulted to the benefit of the estate, costs will be ordered to be paid out of the estate, as between solicitor and client, notwithstanding that creditors cannot be paid in full, *re Hiron*, *Foster v. Hiron*, 26 Gr. 211.



## HEARING ON FURTHER DIRECTIONS OR ON MOTION TO DISTRIBUTE.

(1) *Further directions.*—Where the proceeding is upon bill filed, decree reserving further directions, or upon order where the deceased person resided in the County of York, it is necessary to set the cause down for hearing on further directions, as formerly. Order 418 provides that "the cause is to be entered with the Clerk of Records and Writs at least seven days before the day for which it is set down, and seven days' notice of motion must be served upon all parties entitled to notice thereof."

Under Order 419, "Where further directions have been reserved, if the party having the conduct of the cause does not set down the same for hearing on further directions, and serve notice thereof within fourteen days after confirmation of the report, any other party affected by the report may set the same down and serve notice of hearing."

Under Order 420, "No cause set down for argument of demurrer or by way of motion for decree, or on bill and answer, or on appeal from the Master's report, or on further directions, or on any petition mentioned in Order 418, adjourned over from the day for which such cause was originally set down, is to be brought on for argument during the month of June; and, except on circuit, no cause is to be heard during the month of June, unless counsel certify that no point is involved in it on which it may be necessary for the Court to reserve judgment."

Order 639 provides, *inter alia*, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of the Judge in Chambers or the Court, and on the application for such order, the Judge may review, amend or refer back to the Master his report or order, or make such other order as he deems proper.

This motion is made before a Judge in Chambers on Monday, after the report has become confirmed. All parties are entitled to notice, and the questions already referred to are then open for discussion.

It will be observed that in consequence of this order the power to dispense with payment into Court by purchasers in administration suits, is taken away from the Referee.

*Commission, Division.*—Order 643 provides for the payment of commission upon the value of the estate realized in lieu of costs, as follows:—

"In all suits hereafter instituted for administration or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff now in force, each person properly represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the suit—shall be entitled to his actual disbursements in the suit, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned in the suit, which commission shall be apportioned amongst the persons entitled to costs, as the Judge or Master thinks proper. Such commission shall be as follows:—

On sums not exceeding \$500.....	20 per cent.
For every additional \$100 up to \$1,500.....	5 "
For every additional \$100 up to \$4,000.....	3 "
For every additional \$1,000 up to \$10,000....	2½ "
For every additional \$1,000.....	1 "

And such remuneration shall be in lieu of all fees, whether between 'party and party,' 'as between solicitor and client,' or 'between solicitor and client.'"

Only those who are strictly parties to the suit, properly represented by the solicitor and entitled to costs out of the estate, can claim a share of the commission. Incumbent made parties in the Master's office do not come within the rule.

Where one member of a class sufficiently represents the class, they should appear by the same solicitor, *Gorham v. Gorham*, 17 Gr. 386.

The commission includes fees to counsel and stands in lieu of costs payable out of the estate, but not costs ordered to be paid by one party to another.

Cases might arise where the commission would be an inadequate remuneration for the work done, and in such cases the discretionary power of the Judge may be exercised to order taxed costs under the former tariff.



At the hearing on further directions in an administration suit in the County of York, the Chancellor allowed the costs of the hearing over and above the commission, *re* Field, the Chancellor, May 11th, 1881.

The principle upon which the commission is divisible is laid down in *Dodge v. Clapp*, 8 P. R. 388.

The costs should be divided in proportion to the amount of the work done and responsibility incurred by each solicitor. The question is open for discussion when the report comes before a Judge in Chambers for review; and in some cases the question as to the proper distribution to be made has, by direction of the Judge, been submitted to the Master in Ordinary.

As to revision of costs under the Judicature Act, see O. L., r. 12 (a).

#### PRACTICE UNDER THE JUDICATURE ACT.

The former practice as provided by the Chancery Orders, and given above, remains in force (O. I., r. 3). But in cases where it was formerly necessary to file a bill, the proceedings will now be commenced by writ (O. L., r. 1). This writ must have the various indorsements provided for by O. III., and especially one of those given in the Forms, No. 9 (O. III., r. 6). If no appearance be entered, O. IX., r. 10 provides that the plaintiff shall be entitled to judgment upon *præcipe* "on such evidence (if any) and in such cases (as nearly as may be) as provided for by the present practice of the Court of Chancery." As there was no practice in Chancery by which an order for administration could be obtained upon *præcipe*, judgment will have to be obtained in some other way. If no other mode is open judgment may be obtained by motion to the Court (O. XXXVI., r. 1). If an appearance be entered, unless there is some preliminary question to be tried, an order may be made for the account claimed with all directions now usual in the Court of Chancery (O. XI., r. 1). In other cases a statement of claim must be filed, unless the defendant in his appearance states that he does not require its delivery, (O. XVII., r. 1). For forms of statements of claim, see Forms, Nos. 39 & 41, which, however, shew no case which could not have been disposed of upon notice of motion without an action, and are therefore useless except where the plaintiff has in ignorance commenced his proceedings in the wrong way; and for forms of statements of defence, see Forms, Nos. 40 & 42. The subsequent proceedings will be the same as in any other action. The following provisions of the new rules must, however, be noticed:—

- (1) The form of a notice of motion is given in the Forms, No. 12.
- (2) The form of a judgment by a local Master, Forms, No. 171.
- (3) By O. XII., r. 26, in any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Judge, be entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause against the estate of the deceased in respect of any debt or liability. The Judge may direct any other party to the cause to appear, either in addition to or in the place of the executor or administrator, upon such terms as to costs or otherwise as he shall think fit.
- (4) By O. XLV., r. 3, where an order has been made for the administration of the assets of any testator or intestate, a Judge of any Division shall have power, without any further consent, to order the transfer to such Division of any action pending in any other Division by or against the executors or administrators of the testator or intestate whose assets are being so administered.
- (5) By O. XLVI., r. 8, where the trusts of any will or settlement are being administered, and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the Judge shall otherwise direct.
- (6) By O. L., r. 12 (a), every bill of costs in a suit pending in the Court of Chancery at the commencement of the Act, every bill of costs in any action thereafter brought in any Division of the High Court for the administration of an estate, or for partition, or for the foreclosure, redemption or sale of mortgaged premises, and every bill in any other action where the amount is to be paid out of an estate or out of a fund in Court, or where the amount taxed affects the interest of an infant, shall be subject to revision according to the practice hitherto prevailing in the Court of Chancery; and the Orders of that Court numbered from 310 to 313 inclusive shall in other respects be deemed applicable thereto.

suit in the County of  
and above the commis-

aid down in Dodge v.

of the work done and  
for discussion when  
and in some cases the  
section of the Judge,

r. 12 (a).

s, and given above,  
erly necessary to file  
1). This writ must  
pecially one of those  
e entered, O. IX., r.  
on *precipe* "on such  
provided for by the  
practice in Chancery  
n *precipe*, judgment  
de is open judgment  
If an appearance be  
ed, an order may be  
ual in the Court of  
must be filed, unless  
ire its delivery, (O.  
Nos. 39 & 41, which,  
pon notice of motion  
ainst plaintiff has in ignor-  
rms of statements of  
s will be the same as  
s must, however, be

No. 12.

171.

stration of the estate  
aistrator shall, unless  
in Chambers on the  
te of the deceased in  
other party to the  
utor or administra-  
fit.

he administration of  
on shall have power,  
vision of any action  
administrators of the

ement are being ad-  
trustees of such will  
trustees, the conduct  
all otherwise direct.  
n the Court of Chan-  
ny action thereafter  
tion of an estate, or  
gaged premises, and  
out of an estate or  
interest of an infant,  
evailing in the Court  
310 to 313 inclusive

## INDEX.

NOTE.—The figures within brackets refer to the latter portion of the book.

	PAGE.
<b>ABATEMENT—</b>	
No plea or defence to be pleaded in.....	226
Action not to abate by death.....	355
<b>ABORTIVE SALE—</b>	
Foreclosure after .....	[235]
<b>ABSCONDING DEBTOR'S ACT—</b>	
Proceedings where defendant let in to defend under 11th section .....	126
<b>ABSTRACT OF TITLE—</b>	
When to be delivered.....	[204]
Objections to be answered in 14 days .....	[204]
Master to determine all questions on .....	[205]
No report on abstract to be made.....	[205]
After abstract confirmed, no further objections thereto to be allowed....	[205]
Abstract to be verified.....	[205]
Proceedings on objections to the title .....	[206]
Purchaser may verify when vendor refuses or neglects .....	[206]
<b>ACCOUNT—</b>	
Reference of questions of .....	95, 97
Indorsement of claim for .....	134
Inquiries and accounts, when Court may direct.....	292
When state of, changed in mortgage suit.....	[217]
<b>ACCOUNT, APPLICATION FOR, WRIT INDORSED UNDER ORDER III., RULE 6—</b>	
Indorsement of claim for .....	134
When order for, on default of appearance.....	178
How made, and on what evidence .....	179
Not to interfere with motions for administration or partition on notice .	179
<b>ACCOUNTANT—</b>	
To make annual return of "Account of Official Guardian".....	112
On death, resignation or removal, property vested in, to vest in successor	112
When none, property to vest in officer appointed by Court.....	112
Property now in name of Accountant or Referee to vest in Accountant.	113
Registrar, when to act as .....	400
<b>ACCOUNTANT'S OFFICE—</b>	
Funds in Court to bear expenses of office .....	113
Suitor's accounts in all the divisions to be consolidated .....	399
Common Law Procedure Act, sec. 121, to apply to accounts .....	399
Accountant's cheques to be countersigned.....	399
Chief clerk to initial, before presenting to Accountant.....	400

## ACTION—

"Action," meaning of .....	122
All suits to be by a proceeding called.....	125
Withdrawing .....	240

## ADDRESS FOR SERVICE—

Indorsement on writ .....	134, 136
Defendant on appearing to give .....	163

## ADMINISTRATION SUIT—

Chancery general orders to apply to all the divisions .....	126
Executor only to appear on claims against estate .....	212
Order in, when obtained without bill filed .....	[238]
Who may apply for .....	[238], 241
Form of notice for .....	239
Evidence upon motion for .....	240
Special directions may be given as to carriage of order .....	241
Notice to heirs and devisees necessary if inquiry as to real estate desired .....	241
Court may order inquiry as to real estate after inquiry as to personalty .....	242
What accounts to be taken .....	242
Interest on debts and legacies, from what time computed .....	242
Creditors, how advertised for .....	242
Claims, how sent in .....	242
Creditors not to make affidavit unless called on to do so .....	242
Securities held by creditors to be produced .....	243
Effect of refusal to produce .....	243
Claims to be examined by executor .....	243
Master may appoint person to examine with executor .....	243
Affidavit to be made of result .....	244
Master may postpone time for making .....	245
Creditors to be notified whether claims admitted or disputed .....	245
Form of notice .....	246
Claims may be received after expiry of time limited .....	246
Solicitor to notify creditors when cheques for payment ready .....	246
Notices may be sent by post .....	247
Form of report .....	251
Application to local Master for order, when and by whom .....	252
How Master to proceed under such order .....	252
No money to be paid out of Court without order of Judge .....	252
Solicitors to receive commission instead of taxed costs .....	[256]
Where two or more suits, costs of suit unnecessarily prosecuted may be disallowed .....	[257]
Parties plaintiffs .....	259
" defendants .....	260
Application, how made .....	261
Material on motion .....	261
Forms of order .....	[262], 263
Proceedings in Master's office .....	263
What may be raised on motion to distribute .....	263
Realty to be sold, when .....	264
Further directions in .....	265
Commission to solicitors .....	265
Practice in, under Judicature Act .....	[266]

## ADMINISTRATION—

Joining claims by or against .....	215
Action by or against on behalf of estate .....	185

## ADMISSIONS—

In pleading, how to be made .....	228
Material allegations in pleading of opposite party to be admitted when true .....	289, 290
Party may be called on to admit documents .....	290
Costs where refusal to admit .....	290

PAGE.	PAGE.
122	Form of notice to admit ..... 291, [20]
125	What sufficient evidence of admission ..... 291
240	Of service need not be verified..... 82
	See "Master's Office."
	<b>ADVERTISEMENT—</b>
134, 136	Service of writ by ..... 149
163	For creditors ..... [242]
	For creditors' heirs and next of kin ..... 186
	For sale of land, form of and proceedings on ..... 200
	Publication of ..... [202]
	Misdescription in effect of ..... [200], [237]
	<b>AFFIDAVIT—</b>
126	Evidence by ..... 317
212	Commissioners to take ..... 115
[238],	May be written or printed, or partly both ..... 392
239	To be expressed in first person ..... 396
240	How framed ..... 396
241	To state description and abode of deponent ..... 396
estate desired	To be signed by deponent ..... 396
to personalty .	Jurat where two or more deponents ..... 396
	Indorsement shewing on whose behalf filed ..... 397
	Interlineations or erasures authenticated ..... 397
	Where deponent illiterate ..... 397
	Original to be stamped before being used ..... 397
	Where original previously filed office copy may be used ..... 397
	Of justification on appeal bond ..... 81
	Of service, form of ..... 28
	See "Evidence by affidavit."
	<b>AFFIRMATION—</b>
	"Oath" includes ..... 123
	<b>ALIMONY—</b>
247	When decreed by Court of Chancery ..... [103]
251	Evidence on motion for interim ..... [104]
252	Amount of ..... [104]
252	Order for may be registered ..... [104]
252	Writ of arrest may issue ..... [104]
[256]	Amount of bail on ..... [105]
	No costs <i>de die in diem</i> beyond disbursements ..... [105]
	Costs where plaintiff fails ..... [105]
	<b>AMENDMENT—</b>
257	Of writ of summons ..... 129
259	Irregular proceedings generally ..... 393, 399
260	Striking out parties ..... 204
261	Of statement of claim when defendant added ..... 205
[262],	No new ground of claim to be raised, or fact inconsistent with the
263	previous pleading to be alleged, except by way of ..... 229
264	In County Court actions tried at Assizes ..... 89
265	
265	
[266]	
	<b>AMENDMENT OF PLEADINGS—</b>
215	When allowed ..... 246
185	What allowed ..... 247
	Material on motion for ..... 248
	Terms of order allowing ..... 249
	Costs occasioned by ..... 249
	Compulsory amendment ..... 249
	Where pleadings embarrassing ..... 249
mitted when	"scandalous" ..... 250
289, 290	Plaintiff may amend once without leave ..... 251
290	Defendant may amend without leave... ..... 252
290	

	PAGE.
Motion to disallow amendments, when .....	252
Where amendment by one party, other may amend, when ..	253
Amendment by consent .....	253
When application for leave to amend may be made .....	253
Amendment to be made within limited time after leave granted .....	254
"    how made .....	254, 255
Time within which amended pleading to be delivered .....	255
No amendment without leave while demurrer pending .....	262
See "Amendment."	

## APPEAL—

By one defendant, practice as to others .....	29, 30
None against consent order .....	69
Costs where Court equally divided .....	69
None as to costs when discretionary .....	69
Where motion to commit refused without costs .....	71, 72
Trustees' costs .....	71, 72
Mortgagees' costs .....	71, 72
Bankruptcy .....	71
Where no order except as to costs .....	72
Dismissal of bill without costs .....	72
Costs, charges and expenses .....	72
To Court of Appeal, none without leave in certain cases .....	73, 74
Where title to real estate in question .....	73
Validity of patent .....	73
Value of subject matter \$200 ..	73, 74
Annual rent, etc., involved ..	73
Interlocutory orders .....	75
From Chamber orders .....	76
What cases may be appealed .....	73, 74, 76
Cases formerly appealable .....	76
None unless upon proper notice and giving security .....	76, 77
Extending time for appeal .....	77—79
Time for and practice on .....	79
From County Courts .....	83
Original papers to be used .....	83
Transmission of papers .....	83
Entry for hearing .....	83
Printing of books .....	83
"    "    dates to appear .....	84
Notice of hearing .....	83
Service of papers .....	83
Costs .....	83
Time, computation of .....	84
"    for appealing from Master's Report .....	[195], [229], [255]
To be set down and seven days' notice given .....	[255]
To Divisional Court, from interlocutory orders, when allowed .....	75
From Chamber orders .....	76
See "Divisional Courts."	

## APPEAL, COURT OF—

United with other Courts .....	19
Ex Officio Judges .....	21
Jurisdiction of .....	28, 29, 30
General Orders of .....	79—85
May sit and act at any time and place .....	63
Sittings, vacation .....	84
Justices of, may act as Judges of High Court .....	86
Single Judge may hear certain applications .....	86
May sit in two Divisions .....	86
Security for costs to be by bond .....	80
Bond, form of .....	85
Stay of execution on .....	80, 81
Two sureties in appeal bond .....	80
Affidavit of justification .....	81

PAGE.
252
253
253
253
254
254, 255
255
262

29, 30
69
69
69
71, 72
71, 72
71, 72
71
72
72
72
73, 74
73
73
73, 74
73
75
76
73, 74, 76
76
76, 77
77-79
79
83
83
83
83
83
84
84
83
83
83
84
], [229], [255]
[255]
75
76

19
21
28, 29, 30
79-85
63
84
85
85
86
86
80
85
80, 81
80
81

	PAGE.
Affidavit, justification, form of.....	85
Preparation of case for appeal.....	81
Reasons of appeal.....	81
Appeal books.....	81, 82
"    dates to appear.....	84
"    form.....	85
Cross-appeal not necessary.....	81
Appeal books to be deposited within 30 days.....	82
Entry for hearing.....	82
Court may direct service of notice on other parties.....	82
Parties failing to appear.....	82
Interlocutory applications, how made.....	82
Admissions of service need not be verified.....	82
Costs.....	82
Settling certificate.....	82
Time, Computation of.....	84
Payment of money into and out of Court.....	84
See "Appeal."	

APPEARANCE—

Writ of summons to state place for entering.....	137
By partners.....	143
Undertaking by solicitors.....	146
Time for entering.....	128
Where service out of jurisdiction.....	160
All proceedings to be in office from which writ issued, unless otherwise ordered.....	162
How to be entered.....	162
Solicitor appearing to state place of business.....	163
Party appearing in person to state address and "place for service".....	163
Proceedings where no address.....	163
Form of.....	163, [49]
To state if delivery of statement of claim not required.....	163
To be entered in procedure-book.....	134
Partners to appear by their individual names.....	144
Where firm consists of one person only.....	164
One memorandum to contain names of all defendants appearing by same solicitor.....	164
Solicitor not appearing after undertaking liable to attachment.....	164
Defendant may appear at any time before judgment.....	165
If after time limited notice to be served.....	165
In suit for recovery of land, how person not a party may appear and defend.....	165, 166
Form of affidavit in such case.....	165, 166, [23]
Landlord appearing, to state that he appears as such.....	166
Defence may be limited to part of land in writ.....	166
In such case notice to be served.....	166
Form of notice.....	167, [15]
Defence may be limited to question of amount.....	167
Notice of disputing the amount to be served.....	167
Form of.....	167, [16]
See "Default of Appearance."	

ARBITRATION—

Reference to, not interfered with by new provisions.....	91, 93, 96
See "Award."	

ARBITRATOR—

Powers of, on reference.....	293
------------------------------	-----

ASSESSORS—

Court or Judge may call in aid of.....	97
--	----

	PAGE.
<b>ASSIGNMENT OF CHUSES IN ACTION—</b>	
When validity of, disputed, debtor etc., may interplead or pay money into Court .....	50
<b>ASSIZES—</b>	
Commissions of Assize may be issued .....	64
<b>ATTACHMENT—</b>	
Solicitor not appearing pursuant to undertaking, liable to .....	164
When judgment enforceable by .....	336
Under what circumstances issued .....	345
Leave of Court or Judge necessary .....	345
<b>ATTACHMENT OF DEBTS—</b>	
Order for, when made .....	348
What may be attached .....	349, 350
Effect of serving order for .....	351
Proceedings against garnishee .....	351
Where liability disputed .....	352
Where third party interested in debt .....	352
Payment by garnishee a valid discharge .....	353
Debt attachment book to be kept .....	353
Costs of application .....	354
<b>ATTORNEYS-AT-LAW—</b>	
See "Solicitors."	
<b>AUDITA QUERELA—</b>	
No proceeding by hereafter .....	343
<b>AWARD .....</b>	
Setting aside .....	97
Court may refer back, .....	293
Where final judgment may be signed on .....	294
<b>BAIL—</b>	
Commissioners to take recognizances .....	115
<b>BIDDINGS—</b>	
See "Reserved Biddings."	
<b>BILLS OF EXCEPTION—</b>	
Abolished .....	398
<b>BILLS OF EXCHANGE—</b>	
Parties to actions on .....	184
<b>BODY UNINCORPORATE OR CORPORATE—</b>	
Service upon .....	153
<b>BOND, APPEAL—</b>	
See "Appeal."	
<b>BOOKS—</b>	
See "Documents."	
<b>BREACH OF COVENANT—</b>	
Court of Chancery may grant injunction against .....	[101]
May relieve against forfeiture for breach of covenant to insure .....	[105], [106]
Indorsement where relief granted .....	[106]



PAGE.
50
64
164
336
345
345
348
349, 350
351
351
352
352
353
353
354
343
293
97
293
294
115
398
184
153
[101]
[105], [106]
[106]

BUSINESS OF THE COURTS—	PAGE.
Distribution and arrangement of.....	65, 66, 360
See "Pending Business."	
CAUSE—	
Proceedings included in expression .....	122
CAUSE OF ACTION—	
Amendment of indorsement as to .....	129
Joinder of causes of action .....	212
Against defendant abroad .....	155, 160
CHAMBERS—	
Application at, in Toronto on notice, where not <i>ex parte</i> .....	368
Form of order .....	[68]
Appeal from to be made by motion.....	368
Within what time.....	368
Powers of Masters in Chambers .....	371
Official referee may sit in .....	372
Powers of County Court Judges in.....	372, 373
Applications to County Judge or Local Master to be by summons.....	374
Form of summons .....	[62]
How prepared .....	374
County Judge or Master may refer to a Judge .....	374
Appeals from County Judge or Master .....	375
Master in Chambers, County Judge or Local Master may refer to a Judge.....	374
Matter referred, how dealt with .....	375
Any party may appeal to a Judge .....	375
In what cases appeal will lie .....	375
Appeal by motion, and within what time .....	375
Papers to be transmitted.....	375
Appeal, no stay of proceedings, unless ordered .....	375
Costs of party appearing unnecessarily .....	385
See "Master in Chambers," "County Court Judge," "Local Master."	
CHAMBERS, MASTER IN—	
See "Master in Chambers."	
CHANCERY, COURT OF—	
United with other Courts .....	19
New title of .....	20
Trial in .....	87, 90
Exclusive jurisdiction .....	87, 90
Pending business in .....	404, 505
Act respecting R. S. O., c. 40 .....	[99]
Jurisdiction of, generally .....	[99], [100]
In matters of revenue .....	[100]
As to alimony. See "Alimony".....	[103]
As to partition and sale. See "Partition".....	[106]
As to lunatics and their estates. See "Lunacy".....	[108]
As to wills and matters testamentary .....	[102]
Where contention as to grant of probate .....	[102]
As to infants and their estates. See "Infants".....	[115]
As to settled estates and special cases. See "Settled Estates and Special Cases" .....	[118]
Under Act to prevent Trespasses to Public Lands .....	[120]
Rules of decision in .....	[100]
Judgment at law against equitable defence, bar to subsequent bill .....	[100]
Waste, party in possession by adverse legal title may be restrained from .....	[101]
Breach of covenant, contract, or agreement, injunction against .....	[101]
Damages in addition to, or substitution for, injunction or specific performance .....	[101]
Undertaking as to damages when injunction granted .....	[102]

	PAGE.
Relief against forfeiture for breach of covenant to insure .....	[105], [108]
Certificates of filing bills and of decrees may be registered. ....	[120], [121]
Security for costs, when ordered. <i>See</i> "Security for costs" .....	[121]
May make vesting orders. <i>See</i> "Trustee Acts" .....	[122]
Evidence, purchaser may call for before accepting title .....	[122]
Suit may be revived for costs .....	[122], [123]
Costs when on lower scale. <i>See</i> "Costs" .....	[123]
Receivers, proceedings on appointment of. <i>See</i> "Receivers" .....	[197]
Master's office, proceedings in. <i>See</i> "Master's Office" .....	[181]
Proceedings under order for sale. <i>See</i> "Sales" .....	[199]
Proceedings as to title .....	[204]
<i>See</i> "Abstract of Title."	
 CHANCERY DIVISION—	
Actions from may be tried at separate time .....	302
 CHANGE OF PARTIES—	
When action not to abate by .....	355
Death of sole defendant .....	356
Defendant dead at date of judgment .....	356
Liability of new plaintiff for costs .....	356
Dismissal in default of revivor .....	356
Assignment, creation, or devolution of estate <i>pendente lite</i> . ....	357
Order to add party when necessary, how obtained .....	358
Service of order .....	358
Application to discharge or vary order .....	358, 359, 360
Indorsement on copy served .....	359, [18]
When served by publication .....	360
 CHATTEL—	
<i>See</i> "Detention of Chattel."	
 CHOSE IN ACTION—	
Assignment of, if validity disputed, debtor, etc., may interplead or pay money into Court .....	50
 CIRCUITS—	
Often as necessary .....	91
Separate lists at .....	91
 CLAIM—	
Indorsment of .....	129-134
Statement of .....	233-236
<i>See</i> "Statement of Claim."	
Counter claim .....	34-44
<i>See</i> "Counter Claim."	
 CLOSE OF PLEADINGS—	
Rule as to .....	244
 COMMENCEMENT OF ACT .....	10
 COMMENCEMENT OF PROCEEDINGS—	
Generally as to .....	125
 COMMISSION—	
Solicitors to receive, instead of costs in administration and partition suits .....	[256]
Commission to examine witnesses .....	312
When granted .....	313
Costs of .....	313
Name of proposed Commissioner to be stated in notice of motion for ...	312
Opposite party may, on return of motion, name another .....	312
May be issued to persons proposed or to some others .....	314

# INDEX.

[275]

PAGE.	
[105], [106]	
[120], [121]	
[122]	
[122], [123]	
[123]	
[197]	
[181]	
[199]	
[204]	
302	
355	
356	
356	
356	
356	
357	
358	
358	
358, 359, 360	
359, [18]	
360	
ad or pay	
50	
91	
91	
129-134	
233-236	
34-44	
244	
10	
125	
petition suits [256]	
312	
313	
313	
ion for	
312	
312	
314	

	PAGE.
What order for, to contain .....	314, 317
Examination under, how conducted .....	314
Interrogatories, when to be delivered .....	314
Examination may be <i>ex parte</i> , When .....	315
Notice of examination, how given .....	315
Witness refusing to part with documents produced .....	315
Witnesses to be examined under oath .....	316
Where witnesses do not understand English .....	316
Depositions, how taken .....	316
Evidence, how returned .....	316
Where opposite party joins in .....	317
Trial to be stayed till commission returned .....	317
COMMISSIONERS—	
Power to administer oaths continued .....	115
COMMISSIONS OF ASSIZE, ETC.—	
May issue .....	64
To Judge of Provisional Judicial District of Algoma .....	65
By Division Court Judge .....	65
COMMITTEE—	
To be served for lunatic .....	152
Where none, guardian to be appointed .....	152
See "Lunacy."	
COMMON PLEAS, COURT OF—	
United with other Courts .....	19
COMMON PLEAS DIVISION—	
New title .....	20
COMPROMISE OF ACTION—	
Power as to Counsel and Solicitors .....	71
CONDITIONS OF SALE—	
See "Sales."	
CONFESSION OF DEFENCE—	
Plaintiff may deliver .....	232
Form of .....	[16]
CONCURRENT WRIT OF SUMMONS—	
When to be issued .....	138
For service out of jurisdiction with one for service within .....	139
CONFLICT BETWEEN LAW AND EQUITY—	
Merger .....	49, 50
Mortgagor in possession .....	50
Assignments of choses in action .....	50
Stipulations in contracts as to time, etc. ....	51
Mandamus, injunctions, receivers .....	51, 58
Infants, custody and education .....	58, 62
All other matters .....	62
Changing solicitor .....	62
CONSENT ORDERS—	
No appeal from ....	69, 70
Variation of .....	70
Powers of counsel and solicitors .....	71
CONSOLIDATION OF ACTIONS—	
How effected .....	361

	PAGE.
CONSTITUTION OF SUPREME COURT .....	19
CONTRACT—	
Stipulations as to time, etc., where essence of .....	51
Implied, how to be stated in pleading .....	225
Bare denial of contract, to be denial of the contract in fact, not of legality or sufficiency.....	226
<i>See</i> "Breach of Contract."	
COPIES—	
Of pleadings, only 4 allowed, exclusive of draft .....	222
If more than 3, to be printed .....	222
Party taking to pay solicitor of party producing 10 cents per folio.....	383
CORPORATION—	
Service of writ of summons on .....	153
Examination of officer of .....	278
COSTS—	
In appeal cases, etc., of defendant when plaintiff discontinues.....	240, 241
Where demurrer allowed .....	262
Where demurrer overruled .....	263
To be in discretion of the Court.....	376
Rights of trustees, mortgagees and others to costs out of particular fund not affected .....	376
In action or issue tried by jury, costs to follow event.....	376, 377
Costs of reference .....	377
Security for costs .....	378
<i>See</i> "Security for Costs."	
Fees payable in stamps to be those now payable in similar proceedings in Queen's Bench and Common Pleas.....	382
Where no similar proceedings then those payable in Chancery .....	383
Of taking copies of documents.....	383
Where petition served with notice that costs of appearing will be objected to, \$5 to be tendered for perusing .....	383
Party paying to be allowed same in his costs .....	383
Of improper or unnecessary pleading, affidavit, etc.....	384
Where party receiving costs, liable to pay costs to any other party tax- ing officer to tax and adjust same by set off or otherwise .....	384
Of party appearing unnecessarily .....	385
Of application to extend time.....	395
Where plaintiff fails in County or Division Court through Court having no jurisdiction .....	403
Abated suit may be revived for .....	[122]
Where on lower scale in Chancery.....	[123]
Taxation of, between solicitor and client. <i>See</i> "Solicitors."	
Of proceedings under Trustee Act, 1847 .....	[141]
Out of what fund payable .....	[142], [170]
Of proving claims in Master's office .....	[187]
Solicitors to receive a commission instead of costs in administration and partition suits .....	[256]
<i>See</i> "Taxing Officer's Revision of Taxation."	
COUNCIL OF JUDGES—	
To meet annually to consider procedure and administration of justice ..	102
COUNTER-CLAIM—	
Provisions of Act.....	32, 33
What claims may be raised by .....	34-44
Distinction between, and notice to third party.....	36
"                    " and defence .....	36
Between co-defendants .....	37
Not equal to plaintiff's claim.....	37

PAGE.	
19	
51	
225	
226	
222	
222	
383	
153	
278	
240, 241	
262	
263	
376	
376	
376, 377	
377	
378	
proceedings	
382	
383	
383	
be objected	
383	
383	
384	
party tax-	
384	
385	
395	
court having	
403	
[122]	
[123]	
[141]	
[142], [170]	
[187]	
stration and	
[256]	
of justice ..	102
32, 33	
34-44	
36	
36	
37	
37	

	PAGE.
Must be in respect of a matter which would be the proper subject of an action	37
Separate, joint plaintiffs	38
Must be against plaintiff in same right	38
Where plaintiff, assignee of debt for specific performance, to claim for account	38
Married woman defendant	38
Must seek relief against plaintiff	38
Inconsistent reliefs	39
Party added by, cannot counter-claim	39
Matters arising after action	39
Form of	40
" style of cause	40
Application to strike out	41
Order of examination of witnesses at trial	41
Plaintiff not prosecuting suit	41
Leave to file after time elapsed	41
Judgment	41
Costs	41, 42
Where cannot be conveniently disposed of in same action	42
" " " form of order thereon	44
" " " some issues may be tried first	44
In County Court	117
COUNTERMAND—	
Of notice of trial	298
COUNTY COURT—	
County Court cases, when tried in Superior Courts	88, 89
When Superior Court cases may be tried at	88, 89
Procedure in such cases	88, 89
Motions against verdict in such cases	89
Powers of amendment	89
Where action made a remanet	90
Reference by Judge	90
Certain books to be provided	90
Papers to be forwarded by County Court Clerks	90
Costs in such cases	90
Fees and charges	90
Sec. 1 of 32 V., c. 22, repealed	116
In cases within jurisdiction to grant relief, and give effect to every defence, equitable or legal in like manner as High Court	117
Where defence or counter-claim involves matter beyond jurisdiction	117
High Court may order proceedings to be transferred	118
Rules of law enacted by Act to be in force in	119
Judges may make rules as to appeals from	100
Terms abolished	403
Days for April and October sittings	403
Power of Judges to sit at any time	403
Costs where plaintiff fails through Court having no jurisdiction	403
Pleadings, practice and procedure of High Court to apply and extend to	403
COUNTY COURT JUDGES—	
To be Local Masters, when	106
To be "Local Judges of High Courts" for certain purposes	116
Powers now in actions in Courts of Q. B. and C. P. continued	116
To have same power and authority as Master in Chambers	372
Except in certain matters	372
Where there is a Local Master	373
No jurisdiction in action where writ issues in County of York	373
No limitation of power to make <i>ex parte</i> orders	373
Application to, to be by summons	374
May refer any matter to a Judge	374
May sit at any time	403
See "Chambers, Application in."	

	PAGE.
<b>COURT—</b>	
Powers of, with respect to proceedings before referees.....	97
To exercise jurisdiction over solicitors.....	115
Books, papers, and documents of existing Courts, how dealt with.....	119
<b>COURT OR JUDGE—</b>	
Applications to.....	139
Meaning of words.....	139
<b>COURT HOUSES.</b>	
Prison and Asylum Inspection Act, extended to.....	121
<b>CREDITORS—</b>	
Claims of, how sent in and disposed of.....	[242], [243]
<b>CRIMINAL MATTERS—</b>	
Practice or procedure in, not affected by Act.....	121
Rules do not apply to procedure in.....	402
<b>CROSS RELIEF—</b>	
Prior to Act.....	34
<b>CUSTODY OF INFANTS—</b>	
<i>See</i> "Infants."	
<b>DAMAGES—</b>	
Assessment of, on default of appearance.....	172
On default of pleading.....	266, 267
<b>DATE—</b>	
Writ to be dated on day of issue.....	128
Concurrent writ, double date in.....	138
Pleadings to be marked with.....	223
Amended pleadings.....	255
<b>DEATH--</b>	
Of party, its effect on action.....	355, 358
<b>DEBTS—</b>	
Assignment of.....	50
Special indorsement on writ in action for debt.....	130, 170, 171, 235
Ordinary indorsement on writ in action for debt.....	133
Attachment of.....	346-354
<b>DECLARATION—</b>	
"Oath" includes.....	123
<b>DECREE—</b>	
"Judgment" includes.....	123
<b>DECRETAL ORDERS—</b>	
What are.....	80
<b>DEED—</b>	
Equitable relief against.....	32
<b>DEFAULT—</b>	
Generally.....	269

PAGE.

PAGE.

DEFAULT OF APPEARANCE—

Proceedings on, when defendant of unsound mind.....	168
Where infant defendant and official guardian has not been served.....	169
Service to be proved before taking proceedings on default.....	170
Proceedings where writ specially indorsed.....	170
Proceedings where some only appear to specially indorsed writ.....	170
When plaintiff may sign final judgment on writ not specially indorsed..	171
Where claim not for debt or liquidated demand only interlocutory judg-	
ment may be entered.....	172
Effect of, in action for recovery of land.....	172
Order for account, when made.....	178

DEFAULT OF PLEADING—

Plaintiff failing to deliver statement of claim.....	264
As to extending time.....	264, 265
Where defendant does not deliver defence or demurrer.....	266
Where several defendants, and one makes default.....	266, 267, 268
Where claim is for detention of goods and damages.....	266
Where for debt or liquidated demand and also for damages.....	267
In action for recovery of land.....	267
Where claim for mesne profits.....	267
In other actions.....	268
Where issues other than those between plaintiff and defendant.....	269
Judgment for default in pleading may be set aside on terms..	269

DEFENCE—

Statement of, within what time to be delivered.....	236
Within what time, where statement of claim not required.....	237
Where defendant allowed to defend under Ord. X., r. 1.....	237
Where facts not admitted which ought to have been so, Court may make	
order as to costs.....	237
Where defendant raises questions between himself and plaintiff with any	
other person by counter-claim.....	238
Person, not a party, affected by defence or counter-claim, how served..	238
Person so served to appear as if served with writ of summons.....	239
May deliver reply to counter-claim.....	239
Proceedings, where defence by counter-claim, should be disposed of by	
independent action.....	239
Where, on set-off or counter-claim, balance is in favour of defendant....	240
Court or Judge may allow defence or counter-claim to be withdrawn or	
struck out.....	242

DEFENDANTS—

Joinder of defendants.....	183-197
Non-joinder, substitution and addition of.....	204-211
Representative character to be shown on writ.....	130
Service of writ on.....	146-154
See "Service of Writ."	
Out of jurisdiction, service on.....	155-161
New defendants, service on.....	205
Appearance by.....	162-168
See "Appearance."	
Appearance by stranger in action for land.....	165, 166
Service of notices on defendant who has not appeared.....	367
Freeing defendant from attending particular proceedings.....	183
Statement of defence.....	236-240
See "Defence, Statement of Defence."	
Counter-claim by.....	32-44, 218, 238-240, 252
See "Counter-Claim."	
Co-defendants, default in appearing or pleading by one of.....	170, 267-268
"Defendant," applicable to persons served with process or notice of pro-	
ceedings, or entitled to attend.....	123

DELIVERY OF PLEADINGS—

Mode in general.....	223, 230
Where no appearance entered.....	223

.....	97
.....	115
with.....	119
.....	139
.....	139
.....	131
.....[242], [243]	
.....	121
.....	402
.....	34
.....	172
.....	266, 267
.....	128
.....	138
.....	223
.....	255
.....	355, 356
.....	50
30, 170, 171, 235	
.....	133
.....	346-354
.....	123
.....	123
.....	80
.....	32
.....	269



	PAGE.
DELIVERY, WRIT OF .....	336, 355
DEMURRER--	
Who may demur .....	255
What it shall state .....	255
Form of .....	256, [48]
For multifariousness, .....	183
To any part of a pleading .....	257
After statement of defence .....	257
Joinder of issue and demurrer .....	257
To state some ground in law .....	258
Costs, where answer instead of demurrer .....	258
Within what time to be delivered .....	259
Demurrer and other pleading may be combined .....	259
Pleading and demurring to same pleading, affidavit must be filed .....	260
When leave given without such affidavit .....	260
Who may enter demurrer for argument .....	261
Effect of not entering for argument .....	261
No amendment without leave while demurrer pending .....	262
Costs where demurrer allowed .....	262
Where demurrer fails .....	263
Costs where overruled .....	263
How entered for argument .....	264, [52]
DEPOSITIONS--	
Mode of taking generally .....	310
DEPUTY CLERK OF THE CROWN--	
To have seal of office .....	98
Writs and documents sealed with, to be received as evidence without proof .....	98
Office of, and Deputy Registrar to be consolidated .....	107
Entitled to fees on examinations .....	106
May be commuted for fixed sum .....	106
DEPUTY REGISTRAR--	
To have seal of office .....	98
To be appointed by Lieutenant-Governor .....	106
Writs and documents sealed with, to be received in evidence without proof .....	98
Office of, and Deputy Clerk of the Crown to be consolidated .....	107
County Court clerk to be, where County Judge is Local Master .....	107
To attend trial of actions from Chancery Division .....	303
Same powers as Registrar in issuing decree on præcipe .....	[258]
Decrees issued by, to be entered .....	[259]
DETENTION OF GOODS--	
Default of appearance in action for .....	172
"    pleading in .....	266, 267
Delivery, writ of, in action for .....	336, 355
Lien claimed, deposit in Court .....	364
DISCLOSURE AS TO PARTIES--	
By solicitors and plaintiffs .....	139
Partners suing or sued as a firm .....	143, 199
DISCONTINUANCE--	
Plaintiff may discontinue when .....	240
Defendant's costs where discontinuance .....	240, 241, 243
When leave of Court or Judge required .....	241
DISCOVERY AND INSPECTION--	
Examination before trial may be taken in short-hand .....	272
"    at Law .....	273

PAGE.
336, 355
255
255
256, [48]
183
257
257
257
258
258
259
259
260
260
261
261
262
262
263
263
264, [52]
310
98
98
107
106
106
98
106
98
107
107
303
[258]
[259]
172
266, 267
336, 355
364
139
143, 199
240
240, 241, 243
241
272
272

	PAGE.
Examination in Chancery .....	273
Time for examination .....	273
Procedure to obtain .....	273
Parties to examination .....	273
Service of order for .....	274
Time for service .....	274
Where examination should take place .....	274
Non-attendance, consequences of .....	275
Subject matter of examination .....	276
Depositions as evidence .....	276
Examination on affidavit .....	277
Of officer of corporation .....	278
Where party out of jurisdiction .....	278
Costs of examination .....	278
Production of documents may be ordered .....	279
Consequences of not complying with .....	285
Unless sufficient reasons for requiring production or inspection, no costs to be allowed .....	286
Form of notice to produce .....	286, [19]
Proceedings on receipt of notice .....	286
Form of notice of time when documents will be produced .....	286, [19]
Proceedings where party objects to give inspection .....	287
Consequences of failure to comply with order for discovery or inspection .....	288
Order for discovery or inspection, how to be served .....	288
Solicitor neglecting to notify client liable to attachment .....	289
Party may at trial, on examination of opposite party, as evidence .....	289
When order of course may be obtained .....	279
Production by corporations .....	279, 285
Affidavit must be made although no documents .....	280
What must be produced .....	280
What documents are privileged .....	280, 281, 283
Privilege, how claimed .....	281
Where third person interested .....	282
Place of production .....	283
Sealing up portions .....	284
Who may inspect .....	284
Charges upon inspection .....	284
Third party served by defendant is, for purposes of production and examination, a defendant .....	284
Party for whose benefit action prosecuted or defended a party for purposes of production and examination .....	284
Form of affidavit on production .....	285, [24]
When notice to inspect may be given .....	285
DISMISSAL OF ACTION—	
On default in delivering statement of claim .....	264
Non-appearance of plaintiff at trial .....	304
Discontinuance .....	240
Judgment of non-suit .....	332
For failure to make discovery .....	288
DISTRIBUTION OF BUSINESS .....	65, 66, 360
See "Pending Business."	
DIVISION COURTS—	
Judges may make rules as to appeals from .....	100
Costs where plaintiff fails through Court having no jurisdiction .....	403
DIVISIONAL COURTS—	
Business to be transacted by .....	68
Any number may sit at one time .....	68
Constitution of .....	68
Any Judge of the High Court may sit in .....	68
Powers when only two Judges .....	68
President of .....	68

	PAGE.
Judges required to sit in .....	69
Arrangements for holding .....	69
Appeal from interlocutory orders where .....	75
From Chambers' orders .....	76
What proceedings and matters to be heard and determined before .....	398
Sittings of .....	400, 401
DIVISIONS OF THE HIGH COURT—	
Generally .....	19-23
Document commencing proceedings to be marked with division .....	
Rules of Court to provide for distribution of business among .....	65
DOCUMENTS—	
Notice to admit .....	291
Discovery and inspection of .....	272-299
See "Discovery and Inspection."	
Trial by referees in cases requiring long examination of .....	97
Delivering pleadings and other documents .....	223
DOMINION CONTROVERTED ELECTIONS—	
Practice or procedure in, or matters connected with, not affected by Act .....	121
EJECTMENT—	
Local venue retained in actions of .....	297
See "Land, Action for."	
ELECTION PETITIONS—	
Judges for trial of .....	67
ENTRY OF JUDGMENT—	
Judgment, by whom entered .....	329
Forms of .....	329, [79]
Settling judgments .....	330
Speaking to Minutes .....	330
Variation or correction of .....	330, 331, 334
Date of .....	331
Documents produced on, to be examined by officer .....	331
When pursuant to any order or certificate, when sufficient .....	332
Judgment of non-suit, effect of .....	332
ENTRY FOR TRIAL .....	302
EQUITY—	
General provisions as to administration of, by High Court .....	30-62
Claim of equitable relief to be allowed as by Court of Chancery .....	51
Defence on equitable grounds to have effect as in Court of Chancery .....	32
Equitable rights incidentally appearing to be recognized as in Court of Chancery .....	32-44
Defence on ground for injunction .....	44-47
Waste, equitable to be deemed also legal .....	48
Merger .....	49
Stipulations, not of the essence in equity, to have same effect in all Courts .....	51
Equity to prevail as to custody and education of infants .....	58
Conflicting with Common Law, is to prevail .....	62
Jurisdiction of County Courts in .....	117
EQUITABLE ASSIGNMENTS—	
Debtors, etc., may interplead or pay money into Court in certain cases .....	51
What are sufficient .....	50
EQUITABLE DEFENCES—	
Prior to Act .....	33

PAGE.		PAGE.
69	EQUITABLE ISSUES—	
69	To be tried without jury.....	88
75	At same time as legal.....	90
76	EQUITABLE RIGHTS—	
398	Relief in respect of.....	31-33, 44, 47
400, 401	ERROR—	
19-23	Proceedings in, abolished.....	398
65	ESSENCE OF CONTRACT—	
291	When stipulations are.....	51
272-279	ESTATES—	
97	Representation of.....	185
223	Costs out of.....	376, 386, 387
ed by Act 121	EVIDENCE—	
297	To be taken <i>viva voce</i> .....	310
67	Affidavits, when allowed.....	310
329	Deponents liable to cross-examination.....	310
329, 791	Affidavits, what to state.....	311
330	Costs of unnecessary matter.....	311
330, 331, 334	Court may order examination upon oath, when.....	311
331	Evidence <i>de bene esse</i> .....	312
331	See "Commissions to Examine Witnesses," "Evidence by Affidavit."	
332	EVIDENCE BY AFFIDAVIT—	
332	Where parties consent.....	317
302	Time for filing.....	317, 318
30-62	In rebuttal of defendant's evidence.....	317
31	Deponent liable to cross-examination.....	310, 319
ancery 32	Compelling attendance for.....	320
in Court of 32-44	Notice of motion for judgment where evidence by affidavit.....	320
44-47	EXAMINATION FOR DISCOVERY.....	272
48	See "Discovery and Inspection."	
49	EXECUTION—	
all Courts 51	Stay of, upon appeal.....	80, 91
58	Judgment for recovery of money, how enforced.....	334
62	Time for issuing writs of <i>fi. fa.</i> .....	334
117	Sequestration.....	334
ain cases.. 51	Judgment for payment of money into Court.....	336
50	For recovery or delivery of land, how enforced.....	336
33	For recovery of any property other than land.....	336
	Requiring any act other than payment of money.....	336
	Or to abstain from doing anything.....	336
	"Writ of Execution," includes what.....	337
	Leave to issue when necessary.....	337
	When judgment against partners.....	337
	Præcipe for, what to contain.....	338
	Indorsements on writ.....	338
	Date of writ.....	339
	Directions to Sheriff to be indorsed.....	339
	When writ may be sued on.....	340, 341
	How long to remain in force.....	340
	How writ renewed.....	340
	What sufficient evidence of renewal.....	341
	How issued after six years have elapsed.....	341
	Order of Court or Judge, how enforced.....	342
	By person not a party.....	342
	No right heretofore existing to enforce a judgment taken away.....	343
	Order in which writs may issue not affected.....	343

	PAGE.
<b>EXECUTORS—</b>	
Joining claims by or against.....	215
Actions by, or against, on behalf of estate.....	185
Allowance to, by Court of Chancery.....	[178]
By Surrogate Court.....	[180]
Executor, may retain for his own debt, when.....	[186]
May obtain order for administration.....	[241]
<b>FACT, TRIAL OF ISSUES—</b>	
In any action by different modes.....	298
Trial of issues of fact generally.....	298-300
See "Trial."	
<b>FEES—</b>	
Payable in stamps.....	382
According to what tariff.....	382
Of Official Referees.....	106
Of Local Masters.....	107, 108
Officer paid by fees to make annual return.....	109
<b>FIERI FACIAS—</b>	
Writs of.....	340
See "Execution."	
<b>FILING—</b>	
Delivering pleadings to include.....	230
<b>FINAL JUDGMENT—</b>	
Plaintiff may sign on default of appearance to specially indorsed writ ..	170
Where several defendants, and some only make default.....	171
When plaintiff may sign on default of appearance to writ not specially indorsed.....	171
When no appearance is limited, defence in action for recovery of land..	173
Where claim for <i>mesne</i> profits on damages indorsed on writ for recovery of land.....	173
Where action for foreclosure sale or redemption.....	173, 174
Where action for administration or partition.....	173
On award, when to be signed.....	294
<b>FINAL ORDER—</b>	
See "Mortgage Suits."	
<b>FIRM—</b>	
Action by or against.....	143, 153, 164, 199, 200, 337
Power to sue or be sued.....	199, 200
Disclosure of partners.....	143
Service on.....	153
Appearance by.....	164
Execution against.....	337
<b>FORECLOSURE—</b>	
Evidence to obtain final order.....	[230]
May be opened.....	[232]
After abortive sale.....	[235]
See "Mortgage Suits."	
<b>FOREIGN COMMISSION—</b>	
See "Commission to Examine Witnesses".....	312-317
<b>FOREIGN CORPORATION—</b>	
Action against.....	153, 154

## PAGE.

.....	215
.....	185
.....	[178]
.....	[180]
.....	[186]
.....	[241]
.....	298
.....	298-300

.....	382
.....	382
.....	106
.....	107, 108
.....	109

.....	340
-------	-----

.....	230
-------	-----

.....	170
.....	171
.....	171
.....	173
.....	173
.....	173, 174
.....	173
.....	294

.....	164, 199, 200, 337
.....	199, 200
.....	143
.....	153
.....	164
.....	337

.....	[230]
.....	[232]
.....	[235]

.....	312-317
-------	---------

.....	153, 154
-------	----------

## PAGE.

## FOREIGN COUNTRY—

Action against defendant in .....	127, 155-161
Action against foreign corporation .....	153, 164

## FORMS—

Those in appendices to be used .....	402
May be varied or modified according to circumstances .....	402

## FRAUD—

Pleading necessary .....	228
--------------------------	-----

## GARNISHEE—

Proceedings against .....	345, 353
See "Attachment of Debts."	

## GOODS, DETENTION OF—

Default of appearance in action for .....	172
Default of pleading in .....	266, 267
Delivery, writ of, in action for .....	336, 355
Lien claimed, deposit in Court .....	364

## GUARANTY—

Notice to Guarantor or co-guarantor .....	205-21
---	--------

GUARDIAN *ad litem*—

Appointment of .....	[247]
When Master may appoint .....	[250]

## GUARDIAN, OFFICIAL .....

See "Official Guardian."

## GUARDIANSHIP OF INFANTS—

See "Infants."

## HEARING—

See "Trial."

## HIGH COURT—

Constitution of .....	19-23
President of .....	20
Judges of .....	20
Saving of their powers .....	22, 23
Subsequent appointment of .....	20, 21
Oath of Judges .....	22
In a Superior Court of Record .....	23
Jurisdiction of .....	23-28
Courts whose jurisdiction is transferred .....	19, 24
Pending business of abolished Courts .....	25, 26, 404
Equity and law, how to be administered by .....	30-62
Prohibition cannot issue to .....	44
Appeals from, in what cases .....	69-79
Procedure, failing special provision, to be same as in Court from which jurisdiction transferred .....	27
Sittings may be at any time and place .....	63
Terms abolished .....	63
Vacations .....	64
Distribution of business .....	65
Pending business assigned to respective Courts .....	65
Officers of existing Courts .....	103
See "Officers," "Procedure," "Rules of Court."	

	PAGE.
<b>HOLIDAYS—</b>	
When not reckoned in computation of time .....	393
<b>HUSBAND AND WIFE—</b>	
Joining claims by or against, with separate claims .....	215
Action by or against wife .....	189
Marriage of party to action .....	355, 358
<b>IDIOTS—</b>	
See "Lunacy."	
<b>IMMEDIATE PROCEEDINGS—</b>	
Power of Court or Judge to shorten time for any proceeding .....	395
Pressing applications during vacation to be provided for .....	64
Execution .....	340
<b>INDORSEMENT OF CLAIM—</b>	
Generally .....	129
Indorsement, what to contain .....	129
Various kinds of indorsements .....	130
Forms of indorsement .....	130, [3], [5]
Where party sues, or is sued, in representative capacity .....	130
Special indorsement where recovery of debt or liquidated demand in money on contract sought .....	130, [3], [5]
Sufficiency of indorsements .....	131
Indorsing claim for interest .....	132
Special indorsement where claim for debt or liquidated demand only .....	133, [5]
Indorsement in cases of account, as partnership or trust .....	134, [10], [12]
Indorsement where action for foreclosure or sale .....	134, [11]
Solicitor's name to be indorsed .....	134, 135
Effect of neglect to indorse name of solicitor .....	135
Plaintiff suing in person to indorse residence and occupation .....	136
Where place for service to be indorsed .....	136
Where residence not indorsed or no place for service given, opposite party may post up notices in office .....	136
Where one suing for himself and others .....	198
<b>INDORSEMENT—</b>	
Day of service to be indorsed on writ .....	154
Affidavit of service to state day on which indorsement made .....	155
<b>INFANTS—</b>	
Custody and education of, rules of Equity to prevail .....	58
Authority of father at Common Law .....	58
Statute, 12 Car. 2, c. 24 .....	58
Previous conflict between Law and Equity .....	59
Manner of exercise of Equity jurisdiction .....	60
R. S. O., c. 130, cases thereunder .....	61-62
Sue by next friend .....	188
Where two suits by different next friends .....	188
Where suit improperly instituted .....	188
Service on .....	150, 151
See "Official Guardian."	
Default of appearance .....	169
Jurisdiction of Court of Chancery as to custody of .....	[115]
As to mortgaging, leasing or selling estates of .....	[248]
When Court will order sale .....	[115], [116]
No sale or other disposition against provisions of will or conveyance under which infant entitled .....	[117]
Application for, how made, and proceedings on .....	[117], [118], [248]
Petition what to contain .....	[248]
Infant if fourteen years of age must consent .....	[117], [249]
Court may order some person to execute conveyance for infant .....	[117]



PAGE.
393
215
189
355, 358
395
64
340
129
129
130
130, [3], [5]
130
emand in
130, [3], [5]
131
132
d only 133, [5]
134, [10], [12]
134, [11]
134, 135
135
136
136
osite party
136
198
154
185
58
58
58
59
60
61-62
188
188
188
188
180, 151
169
[115]
[115], [248]
[116]
onveyance
[117]
[117], [118]
[117], [248]
[117], [249]
t [117]

	PAGE.
Conveyance so executed valid. . . . .	[117]
Money arising from sale to be laid out as directed by the Court. . . . .	[117]
Surplus to have same nature and character as estate disposed of . . . . .	[118]
Where estate subject to dower, Court may give gross sum in lieu of, or annual payment . . . . .	[118]
Guardians may be removed by the Court . . . . .	[118]
When interested in settled estates . . . . .	[119]
Guardians how appointed . . . . .	[247], [248]
Service with O. C. decree, how effected . . . . .	[247]
Evidence in support of application to sell or lease, how taken . . . . .	[249]
Where day to shew cause reserved, notice to be served . . . . .	[249]
Master to fix times for passing accounts . . . . .	[250]
<b>INFORMATION—</b>	
Signature to amendment of. . . . .	125
<b>INJUNCTION—</b>	
Definition of. . . . .	47
No proceeding to be restrained by . . . . .	44
May be granted by interlocutory order. . . . .	51
Although defendant in possession claiming title . . . . .	52, [101]
When granted . . . . .	55-56
Costs . . . . .	56
Writ should be indorsed claiming . . . . .	57
Against breach of covenant, contract, or agreement . . . . .	[101]
Damages in addition to, or substitution for . . . . .	[101]
Undertaking as to damages when injunction granted . . . . .	[102]
No writ of, to issue . . . . .	364
Judgment or order to have same effect as . . . . .	364
<b>INQUIRIES AND ACCOUNTS—</b>	
When Court may direct . . . . .	292
See "Arbitrator," "Official Referees."	
<b>INSOLVENCY—</b>	
Claims of assignee as such, not to be joined with other claims. . . . .	215
<b>INSPECTION—</b>	
Of documents . . . . .	285-289
See "Discovery and Inspection."	
Subject of litigation, inspection of. . . . .	362
<b>INSPECTOR OF OFFICES—</b>	
Lieutenant-Governor may appoint . . . . .	113
Duties of. . . . .	113, 114
May institute inquiries into official conduct of officers . . . . .	114
Officers to produce books and documents for inspection by . . . . .	114
<b>INTEREST—</b>	
Indorsing claims for . . . . .	132
Execution for. . . . .	339
<b>INTERLOCUTORY APPLICATIONS—</b>	
In appeal cases, how made . . . . .	82
To a single Judge. . . . .	86
<b>INTERLOCUTORY JUDGMENT—</b>	
When entered on default of appearance . . . . .	172
On default of pleading. . . . .	266 267
<b>INTERLOCUTORY ORDERS—</b>	
What are . . . . .	75
No appeal from, in certain cases. . . . .	75

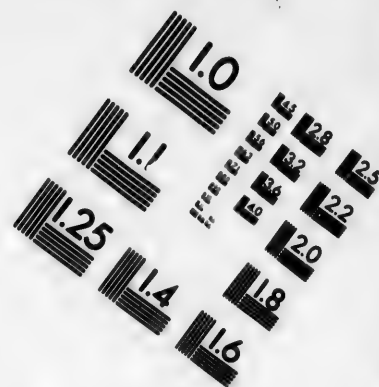
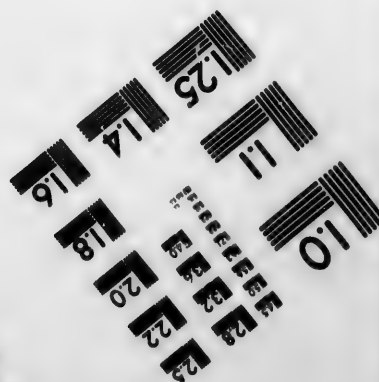
	PAGE.
Where order for preservation or custody of property, or payment into Court will be made .....	362
Order for sale of perishable goods .....	362
Order for detention, preservation or inspection of any property.....	362, 363
Application for, by whom, and how made .....	363
At what time .....	364
Party claiming to retain property by virtue of lien, or as security, payment into Court may be ordered .....	364
INTERLOCUTORY PROCEEDINGS—	
To be taken in Division to which action attached .....	66
INTERPLEADER—	
By debtor, trustee, etc., to whom notice is given that an assignment of the debt is disputed .....	50
Procedure and practice .....	126
Application by defendant, when to be made .....	126
INTERPRETATION—	
Of certain words .....	122, 123
INTERVENING—	
In action for land .....	165, 166
IRREGULARITY—	
Court may set aside proceedings as irregular, or amend .....	398, 399
Effect of non-compliance with rules .....	398
ISSUES—	
Various methods of disposing of .....	91
<i>See</i> "Reference."	
Where necessary, and how settled .....	245
Trial of issues of fact generally .....	298-300
JOINDER OF CAUSES OF ACTION—	
Several may be joined .....	212, 213
Separate trials may be ordered .....	212
What may be joined with action for recovery of land .....	214
What claims may, or may not be joined .....	215
Defendant may apply for order confining action to certain causes .....	216
Court or Judge may exclude any of the causes and amend statement of claim or writ of summons .....	216
JOINDER OF ISSUE .....	244, 245
JOINDER OF PARTIES—	
Generally .....	180-212
<i>See</i> "Parties."	
Misjoinder of .....	201-202
<i>See</i> "Misjoinder of Parties."	
JUDGES—	
Meaning of "Judge" in orders .....	139, 404
To be called Justices .....	20
Appointment of .....	20
Who may be appointed .....	20
All to have equal jurisdiction .....	20, 21, 22
Titles, Precedence, etc., .....	20, 21
<i>Ex officio</i> of Court of Appeal .....	22
Oath of office .....	22
Powers and duties .....	22, 23
Not to reserve cases for Divisional Court .....	67

	PAGE.
or payment into	362
property.....	362, 363
as security, pay-	363
	364
	66
an assignment of	50
	126
	126
	122, 123
	165, 166
and.....	398, 399
	398
	91
	245
	298-300
	212, 213
	212
	214
	215
tain causes	216
amend statement of	216
	244, 245
	180-212
	201-202
	139, 404
	20
	20
	20
	20, 21, 22
	20, 21
	22
	22
	22, 23
	67

	PAGE.
When to be deemed to constitute a Court .....	88
Retiring or transferred to another Court, may give judgment within six weeks .....	121
<b>JUDGMENT—</b>	
On what evidence obtained where writ specially indorsed .....	174, 175
What indorsements sufficient for .....	174
Who may make affidavit .....	174, 175
Where application for, to be made .....	175
Application, how answered .....	175, 177
Direction of Court on application .....	176
Appeal from order .....	176
Forms of orders on .....	[65], [66]
Forms of judgments on .....	[81], [84]
Application for, to be on notice served two clear days .....	177
If defence applies to part only, plaintiff may have judgment for the rest .....	177
Where several defendants, one may be permitted to defend and judgment signed against the others .....	178
Leave to defend may be given unconditionally or on terms .....	178
Entering against separate estate of married women .....	196
Against partners .....	143
Subject to a condition or contingency, how enforced .....	337
Ather reference .....	96
Order of Court or Judge may be enforced in same manner as a judgment .....	342
May be given within 6 weeks by retiring Judge .....	121
See "Motion for Judgment, Entry of Judgment."	
<b>JUDGMENT DEBTOR, EXAMINATION OF—</b>	
No order necessary for .....	346
Where judgment against a corporation .....	347
Attendance for, how enforced .....	348
See "Attachment of Debts."	
<b>JUDGMENT, MOTION FOR .....</b>	<b>324</b>
See "Motion for Judgment."	
<b>JURISDICTION OF HIGH COURT .....</b>	<b>23, 25</b>
See "Judges."	
In suits under £10 .....	24
<b>JURY—</b>	
What cases are to be tried by .....	87, 88
Notice for jury .....	88
Procedure in such case .....	88
Waiver of notice .....	88
Judge may require a jury to sit .....	88
Effect of finding by Judge .....	88
Equitable issues to be tried without jury .....	88
Separate lists for jury and non-jury cases .....	91
Jury fees in County Court cases tried at assizes .....	90
<b>JUST ALLOWANCES—</b>	
What are to mortgagee .....	[227]
<b>LAND—</b>	
Joining claims in actions for recovery of .....	214
Service of writ in case of vacant possession .....	154
Appearance by person not named in writ .....	165, 166
Limiting defence .....	166, 167
Judgment by default of appearance .....	172
Statement of defence need not shew title unless, etc .....	227
Judgment for default of pleading .....	267
Writ of possession .....	336

	PAGE.
Waste .....	48
Merger .....	49
Mortgage .....	50
Injunction against waste or trespass .....	51-58
<b>LAW—</b>	
All Courts to give effect to the rules of law enacted or declared .....	119
Amendments, etc., of law .....	30-62
Equity to prevail in case of conflict not specified .....	62
Questions of law .....	294-297
<i>See</i> "Special Case."	
Demurrer .....	255-264
<b>LEAVE TO DEFEND—</b>	
Claim for debt, specially indorsed .....	174-178
By one of several defendants .....	178
Unconditional, or on terms .....	178
When granted .....	175
<b>LIEN—</b>	
Delivery of property subject to, on deposit in Court .....	364
<b>LIMITATIONS, STATUTE OF—</b>	
Express trust and breach not barred as between <i>cestui que trust</i> and trustee .....	48
Renewal of writ to save .....	144
Pleading necessary .....	228
<b>LIS PENDENS</b> .....	145
<b>LOCAL MASTERS—</b>	
Lieutenant-Governor to appoint .....	107
One in each county or union of counties .....	105
To reside in the county .....	105
Fees of, may be commuted for fixed salary .....	107
Where receiving salary, fees in office to be paid by stamps .....	108
Where prohibited from practising .....	108
Judges of County Courts to be, when .....	105
May make order for administration .....	[252]
How to proceed under such order .....	[252]
May make order for partition when .....	[253]
<b>LUNACY—</b>	
What "Lunatic" includes .....	[108]
Jurisdiction of Court of Chancery as to lunatics and their property .....	[108]
Proceedings where commission and inquisition thereupon .....	[108]
Limitation of time for traversing .....	[108]
How traverse tried .....	[108]
Court may require security from party traversing .....	[100]
Effect of failure to give security .....	[109]
New trial may be ordered .....	[109]
Inquisition without commission .....	[110]
Notice of application to be served .....	[110]
In such case no traverse, but new trial may be ordered .....	[110]
Lunatic to be produced if within jurisdiction .....	[110]
Court may dispense with his examination .....	[119]
What may be inquired into .....	[111]
Court may declare lunatic on summary application .....	[111]
Committee, how appointed .....	[250]
Property, how protected .....	[111]
Committee must file inventory .....	[112]
Committee of estate must give security .....	[112]
Committee of the person gives no security .....	[112]
Proceedings in case of lunatic's death .....	[112]

PAGE.	PAGE.
48	Proceedings where personal property insufficient to pay debts ..... [113]
49	Court may order mortgage, lease or sale of real estate ..... [113]
50	No preference in payment of debts ..... [113]
51-56	Where personal estate and rents insufficient for maintenance of lunatic and his family, Court may mortgage, lease, or sell real estate ..... [114]
119	Surplus of same nature and character, as estate mortgaged, leased or sold. .... [114]
30-62	Court may order conveyance by lunatic trustee ..... [114]
62	See "Trustee Acts."
294-297	Conveyances by Committee under direction of Court valid. .... [115]
255-264	Specific performance of contract by lunatic, when decreed ..... [115]
	Order of single Judge may be re-heard. .... [115]
	By whom Court may order costs to be paid ..... [115]
	Master may fix times for passing accounts ..... [250]
174-178	LUNATIC—
178	Jurisdiction over ..... 25
178	Guardian <i>ad litem</i> to be appointed if no Committee ..... 152
175	May sue by committee or next friend ..... 216
	May defend by committee or next friend ..... 217
364	Jurisdiction of Court over ..... 217
	See "Lunacy."
trust and	MANDAMUS—
48	May be granted by interlocutory order ..... 51
144	Practice and decisions as to ..... 52-55
228	MARRIAGE—
145	Effect upon action of marriage of party ..... 355-358
107	MARRIED WOMEN—
105	Service of writ on ..... 149
105	When they may sue or defend without their husbands, or without next friends ..... 189
107	Separate estate of ..... 189
108	Creation of separate estate ..... 189
108	Incidents of ..... 190
105	Contracts affecting separate estate ..... 190, 195
[252]	Nature of creditor's lien on ..... 191
[252]	Ontario Statutes affecting ..... 191, 192, 193
[253]	What property affected by these ..... 194
	R. S. O., c. 125, affects only separate estate in possession ..... 194
	Entering judgment against separate estate ..... 196
	Next friend of, must be friend of substance ..... 197
108	MASTER IN CHAMBERS—
108	Powers and jurisdiction of ..... 371, 372
108	Any official referee may sit with or for ..... 372
100	May refer any matter to a Judge ..... 374
109	See Chambers, Application in.
109	MASTER'S OFFICE—
110	Order of reference to be brought in within 14 days ..... [181]
110	Where delay in prosecuting, Master may change conduct of reference. .... [181]
110	References to be proceeded with on day fixed, and <i>de die in diem</i> ..... [182]
119	No adjournment merely to proceed with another reference ..... [183]
111	Warrant to consider to be issued ..... [183]
111	Master may dispense with ..... [183]
250	Proceedings upon warrant to consider ..... [183]
111	Solicitor may be appointed to represent a class ..... [184]
112	Master may make inquiries without special directions in order ..... [184]
112	May take account with rests ..... [184], [226]
112	Take account of rent and profits ..... [184], [226]
112	Set occupation rent ..... [184], [226]

[illegible]

# Photographic Sciences Corporation

23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4103

1.8  
2.0  
2.2  
2.5  
2.8  
3.2  
3.6  
4.0  
4.5  
5.0  
5.6  
6.3  
7.1  
8.0  
9.0  
10.0  
11.2  
12.5  
14.0  
16.0  
18.0  
20.0  
22.5  
25.0  
28.0  
31.5  
36.0  
40.0  
45.0  
50.0  
56.0  
63.0  
71.0  
80.0  
90.0  
100.0

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100



Inquire as to repairs and improvements .....	[184]	[226]
Make just allowances .....	[184]	[227]
Report special circumstances .....		184
Witnesses may be examined before any examiner .....		185
Foreign Commissions may issue on Master's certificate .....		185
Master may order production and inspection of books and papers .....		155
May advertise for creditors, heirs, and next of kin .....		186
Creditors claims, how sent in .....		242
To allow or disallow claims sent in .....		186
Costs of proving claims, how disposed of .....		187
As to execution of conveyances, and delivery of deeds .....		187
Accounts, form of, and how verified .....		188
Books of account, when <i>prima facie</i> evidence of contents .....		188
No states of facts, charges or discharges to be brought in .....		188
Copies, abstracts or extracts, when to be supplied .....		188
Party bound to obey Master's direction without a warrant .....		188
Day to be named for making admissions, or warrant issued .....		189
Costs of proving what should have been admitted .....		189
How such costs recovered .....		189
Surcharge where accounting party does not admit receipt of money .....		189
"Master's book" to be kept, and what it is to contain .....		190
Certificates of proceedings to be given .....		190
Master may dispense with proceedings ordinarily taken where unnecessary .....		190
Where different days appointed, separate warrants not required .....		191
Consequence of default on appointment .....		[191]
Where persons not parties ought to attend, service of O. C. decree may be directed .....		[191]
Rules as to proceedings in absence of certain parties and as to service on them .....		[192]
Indorsement on O. C. decree served .....		193
Party served may move to add to, vary, or set aside decree .....		193
No evidence to be received after hearing closed .....		193
Parties to raise before Master points which may be raised on appeal .....		193
Accounts and evidence not to be set out in reports .....		[194]
Schedule of sums found by report to be given where moneys in Court affected .....		[194]
Report to whom to be delivered out .....		194
Report when absolute .....		194
Duplicate may be filed .....		196
Appeal from report, how taken .....		195
Time for appealing .....	[195], [229]	255
Clerical error in, how amended .....		195
Money to be made payable at some bank .....		196
To whose credit to be payable .....		196
What sufficient evidence of default .....		197
Master may grant certificate closing reference where delay in prosecuting .....		[250]
Master may order payment of costs by party neglecting to attend appointment .....		[250]
May appoint guardian <i>ad litem</i> , when .....		[250]
May fix time for receiver, committee or guardian to pass accounts .....		[250]
See "Receivers," "Sale," "Mortgage Suits," "Administration Suits."		

## MASTER'S REPORT—

Time for appealing from .....	[229]
Confirmation of .....	229
On sale, form of .....	202
In administration suits, form of .....	251
Appeal from within what time .....	[195], [229], 255
Appeal to be set down and seven days' notice given .....	[255]

## MERGER—

By operation of law, none where the beneficial interest would not be deemed merged in Equity .....	49
Mortgages may take release of equity of redemption without merging debt .....	49

PAGE.		PAGE.
[184], [226]	Definition of .....	49
[184], [227]	And extinguishment, distinction .....	49
184	Intention governs construction .....	49
185	Does "estate" include a charge? .....	49
185	Estates tail do not merge in reversion .....	50
155		
186	MESNE PROFITS—.....	173
242		
186		
187	MISJOINDER OF PARTIES—.....	201, 202
187	Adding plaintiffs.....	202
188	When defendant may be added .....	202
188	Form of order adding.....	204
188		
188	MONTH—	
189	Means lunar month, where not otherwise expressed .....	392
189		
189	MORTGAGE SUITS—	
189	Sale may be ordered instead of foreclosure .....	[206]
190	Surety may be made party and relief given against .....	206
190	Sale may be ordered without giving time to redeem .....	[207], 224
190	Deposit, where sale asked by mortgagor .....	207
191	Plaintiff may elect to give defendant conduct of sale .....	207
191	In such case deposit to be returned .....	208
	Sale, how obtained by incumbrancer .....	[216], 227
	Where cause heard <i>pro confesso</i> and no reference, what to be produced .....	208
	Amount due may be determined without reference .....	208
	Where infant defendant, order may be obtained in Chambers.....	[208], 223
	Even if adult, also a defendant.....	[209], 257
	<i>Procipe</i> decree, when plaintiff entitled to .....	173, 174, [209], 223
	Evidence, necessary to obtain.....	[210], 223
	Indorsement on bill.....	210
	Must specify whether sale or foreclosure desired .....	210
	Parties interested in equity of redemption may be made parties in Master's Office.....	[210], [225]
	Prior mortgagee, party to bill, where relief sought against him .....	211
	Decrees for foreclosure or sale, what to contain.....	211
	Master to inquire as to incumbrancers .....	[211], 224
	Certificates of Registrar and Sheriff to be produced .....	212, 224
	Subsequent incumbrancers, notice to.....	[212], [213], 224
	May move to discharge notice.....	212
	Non-attendance of, equivalent to disclaimer .....	213
	Master to take accounts, tax costs and fix time and place for payment .....	[213], 225
	Final order of foreclosure or sale, how obtained .....	[214], [215], 230
	Evidence to obtain .....	[215], 230
	Time for payment may be enlarged.....	[214], 231
	Master to report names of parties made in his office and priorities.....	214
	Proceedings on payment .....	333, [214], 229
	Subsequent accounts to be taken.....	215
	Where sale ordered, how sold .....	216
	Purchase money, how applied .....	216
	Order for deficiency, when mortgagee entitled to.....	216
	Proceedings where state of account changed.....	[217], 230
	Notice may be given, or order for new day obtained.....	217
	On payment of arrears bill may be dismissed or proceedings stayed.....	218
	How decree enforced on future default .....	218
	Delivery of possession may be ordered .....	[218], 222
	No costs of double proceedings on mortgage .....	222
	Proceedings in redemption suit against incumbrancers, when mortgagor makes default.....	333, [219]
	As to parties plaintiffs.....	[220], 221
	As to parties defendants.....	[220], 221
	Practice and procedure generally.....	221
	As to arrears of interest .....	222

	PAGE.
Right to call in principal .....	[222]
Proceedings by mortgagor for redemption .....	[223]
Disputing note, effect of .....	223
Costs in mortgage suits .....	228
Incumbrancer let in to prove after foreclosure .....	228
Redemption, times allowed for .....	228
What relief granted on <i>precipe</i> decree .....	257
Plaintiff's claim to be verified when service not personal .....	257
Indorsement, where immediate execution prayed .....	134, 258
Indorsement, when delivery of possession prayed .....	134, 258
Every decree absolute in first instance .....	[258]
<b>MORTGAGOR—</b>	
In certain cases may sue for possession, rents and profits, trespass, etc. .	50
<b>MOTION FOR JUDGMENT—</b>	
Judgment to be obtained by motion for .....	324
Motion to set aside judgment may be made without leave reserved .....	324
Where no direction of a Court or Judge for entry of judgment .....	325
Where certain issues determined and trial of others unnecessary .....	325
None after expiry of one year .....	326
Powers of Court on .....	326
On admissions or documentary evidence .....	327-328
When Court may turn any application into .....	328
Where Court may give leave to make, after writ of summons served .....	329
<b>MOTION FOR NEW TRIAL—</b>	
To be to a Divisional Court .....	321
To be by motion calling on opposite party to shew cause .....	321
Within what time to be made .....	322
Copy of order to be served .....	322
On what grounds new trial may be ordered .....	323
Order to shew cause, a stay of proceedings .....	323
Counsel making application to begin .....	323
Powers of Court on .....	326
<b>MOTIONS—</b>	
Applications to Court or Judge to be by motion .....	365
No rule or order to shew cause to be granted .....	366
No motion without previous notice to opposite party .....	366
Court or Judge may in proper case make order <i>ex parte</i> .....	366
Two clear days between service and day for hearing motion .....	366
Where all parties interested not served, Court may dismiss or adjourn motion .....	367
Court may adjourn any motion .....	367
No leave necessary to serve defendant who has not appeared to writ of summons .....	367
Court may give leave to serve notice of motion with writ of summons, or before time for appearance .....	367
Notice of motion for injunction may be served without leave .....	367
<b>MULTIFARIOUSNESS—</b>	
Demurrer for .....	183
<b>NEW ASSIGNMENT—</b>	
Amendment substituted therefor .....	227
<b>NEW TRIAL—</b>	
Motion for, generally .....	321-323
<b>NEW TRUSTEES—</b>	
Court may appoint .....	[162]
Cases in which it will do so .....	[162]

PAGE.
222
223
223
228
228
228
257
257
134, 258
134, 258
258
50
324
324
325
325
326
326
327-328
328
329
321
321
322
322
323
323
323
326
365
366
366
366
366
366
adjourn
367
367
writ of
367
mons, or
367
367
183
227
321-323
[162]
[162]

	PAGE.
Principles which guide discretion of the Court	163
Who may, or may not, be appointed	163
Powers of new trustees	164
Court may vest lands in	164
May vest right to sue, or call for transfer of stock	165
Old trustees not discharged from liability	165
Who may apply for appointment of	165
May apply by petition	166
What may be done on petition	166
May be dismissed with or without costs	167
Court may make order in a cause	167
Orders founded on certain allegations to be conclusive evidence of matters contained in such allegations	167
Court may exercise powers in case of trustees of charities	168
May appoint new trustees in place of persons convicted of felony	176
May appoint, where no existing trustees	176
<b>NEXT FRIEND—</b>	
Infants sue by	188
Not to be added without consent	205
Of married women must be person of substance	197
<b>NIPissing, DISTRICT OF—</b>	
Justice of the Peace in, need not be resident or possess property	121
<b>NON-COMPLIANCE WITH RULES—</b>	
Effect of	398
Court may set aside irregular proceedings or amend on terms	398, 399
<b>NON-SUIT—</b>	
Effect of	332
<b>NOTICES—</b>	
Writing generally required	392
Judge may authorize oral notice	392
Service of, before appearance	367
In lieu of service of writ	127, 161
Limiting appearance in action for land	166
Of disputing amount	167
Appearance after time, notice of	165
Inspection, notice to produce for	285
Notice, to admit	290, 291
Admission, notice of	289
Of trial	298, 301, 302
Of countermand	298
Third party, notice to	33, 204-211
<b>NOTICE IN LIEU OF SERVICE—</b>	
Form of	127, [2]
To be served in same manner as writ of summons	161
<b>NOTICE OF DISPUTING AMOUNT—</b>	
Questions which can be raised under	167, 168
See "Mortgage Suits."	
<b>OATHS—</b>	
Commissioners to take, continued	115
"Oath," includes affirmation and declaration	123
Judges' oaths	22
Officers' oaths	104

**OFFICERS—**

Officers of existing Courts attached to their respective divisions.....	103
Masters in Chancery and Taxing Officers attached to Supreme Court...	103
Doubt as to position of officer to be determined by Rule of Court .....	103
Lieutenant-Governor may change official names and regulate duties of officers .....	103
When Court or Judges may remove officer.....	104
Subject to Order in Council, rules of Court may distribute business among .....	104
Existing securities given by, continued.....	104
Oath to be taken before entering on duties .....	104
Before whom taken.....	105
Authority of certain officers preserved.....	105
Paid by, fees to make annual return.....	109
See "Inspector."	
Officers to be auxiliary to one another .....	369
Judgment Clerks, duties of .....	369
Deputy Clerks of the Crown and Deputy Registrars, powers and duties of .....	369
See "Deputy Clerks of the Crown," "Deputy Registrars."	
What orders to be entered at Toronto .....	370
Master in Chambers, powers and jurisdiction of.....	371, 372

**OFFICIAL GUARDIAN—**

Lieutenant-Governor to appoint.....	109
Duties of .....	109, 111
Costs heretofore paid Guardian to be paid into Court .....	110
Where estate small Court may dispense with.....	110
To be paid fixed salary .....	110
Order determining to be laid before Assembly .....	119
Surplus to be transferred to Suitors Fee Fund Account .....	110
Solicitor employed by Guardian entitled to costs .....	111
Affidavit verifying amount received to be filed every six months .....	111
New Guardian, on appointment, to receive books and papers from predecessor .....	111
May be restrained from practising .....	111
Accountant to make annual return of Guardian's account.....	112
Service of writ on, for infants .....	150, 151
Party interested may move to appoint another Guardian.....	151
Where default of appearance by person of unsound mind or infant, and Guardian has been served.....	168, 169

**OFFICIAL REFEREES—**

Reference to, of questions arising in actions .....	91
Are officers of the Court .....	98
What officers are referees .....	106
Additional, may be appointed. ....	106
Court or Judge may order questions or issue of fact, or question of account to be tried before.....	97
Not in a criminal proceeding by the Crown.....	97
When consent of parties necessary.....	97
Trial before, how conducted.....	98
Report, unless set aside, equivalent to a verdict .....	98
Powers of Court or Judge with respect to proceedings before.....	98
Where receiving salary, fees on proceedings before, to be paid in stamps. ....	106
Powers of, on reference.....	292, 293, 306
See "Trial."	
May sit with, or for Master in Chambers .....	372

**ORDERS—**

May be enforced as judgments.....	342
When in favour of person not a party .....	342
Requiring entry, to be entered at Toronto.....	369

PAGE.	
103	.....
103	Court...
103	rt .....
103	duties of
103	.....
104	.....
104	business
104	.....
104	.....
105	.....
105	.....
109	.....
369	.....
369	.....
369	wers and
370	.....
371, 372	.....
109	.....
109, 111	.....
110	.....
110	.....
110	.....
110	.....
111	.....
111	.....
111	is
111	from pre-
111	.....
111	.....
112	.....
150, 151	.....
151	.....
151	fant, and
168, 169	.....
91	.....
98	.....
106	.....
106	.....
97	on of ac-
97	.....
97	.....
98	.....
98	.....
98	.....
106	stamps.
292, 293, 308	.....
372	.....

PAPER—

To be of foolscap size .....	392
------------------------------	-----

PARTICULARS—

Special indorsement of particulars of debt .....	131
Of debt not specially indorsed .....	171

PARTIES—

Plaintiffs who may be joined as .....	180, 181
Costs of defendant where persons not entitled to relief joined as plaintiffs .....	180
Court may substitute or add other persons as plaintiffs .....	182
Defendants who may be joined as .....	183
Not necessary that every defendant should be interested as to all the relief prayed .....	183
Defendant not to be embarrassed by proceedings in which he has no interest .....	183
All persons severally or jointly and severally liable on one contract may be joined as defendants .....	184
Where doubt exists, several defendants may be joined to determine which liable .....	185
Trustees, executors, and administrators may sue and be sued without joining parties beneficially interested .....	185
Where breach of trust charged .....	187
Infants sue by next friend .....	188
Where parties numerous one or more may sue or defend for benefit of all .....	197
How far persons not parties bound by proceedings .....	197
Where rights of a class depend on construction of an instrument Court may appoint one or more to represent, before inquiring as to individuals composing the class .....	199
Co-partners may sue or be sued in name of firm .....	199, 200
Chancery Orders as to parties, in force .....	200
Cases in which defendant cannot object for want of parties .....	200
Misjoinder not to defeat action .....	201
Court or Judge may at any stage strike out .....	204
No plaintiff, or next friend of plaintiff, to be added without consent .....	204
Defendants added, how served .....	204
When application to add, strike out, or substitute, may be made .....	205
Where defendant added, amended writ to be sued out .....	205
Where question arises, not only between plaintiff and defendant, but between them and other persons, order may be made for having question determined .....	205
Where defendant entitled to contribution, indemnity, or relief over against any other person, order may be made .....	205
Cases where rule does, or does not apply .....	206, 207, 208
Third party may move to discharge or vary order .....	209
Costs on determination of such question .....	209
Where defendant entitled to contribution, indemnity or relief from person not a party .....	210
Court may order plaintiff to give notice to person against whom relief sought .....	210
If party served disputes the claim appearance be entered .....	211
Court to direct mode of having question determined .....	211
Court may give liberty to defend on terms .....	211
Plaintiff not to be delayed by questions between defendants .....	211
Service of notice of judgment on infant or person of unsound mind, to bind him, to be effected in same manner as of writ of summons .....	211
Who to appear in administration suits in claims against estate .....	212
Master may order service of O. C. decree on persons not parties .....	[191]
Rules as to parties and service on persons not parties .....	[192]

PARTITION—

Jurisdiction of Court of Chancery .....	[106], [107]
Costs on suits for .....	[107]
Allowance for improvements, when made .....	[107]

342	.....
342	.....
369	.....



	PAGE.
Effect of deed to carry out decree .....	107
Office copy decree or report, evidence of the several holdings and shares. ....	107
Local Master may make order for .....	253
No money to be paid out of Court without order of Judge .....	254
Order in Chambers where other lands discovered .....	254
Where orders made in different counties, then application in Chambers as to conduct of proceedings .....	254
Solicitors to receive commission instead of taxed costs. ....	256
 <b>PARTNERSHIP—</b>	
Writ issued in name of, on demand, names and residences of members to be given ..	143
Action how to proceed thereafter. ....	143
Service on partners .....	143, 153
Appearance by partners .....	143, 164
Partners parties to actions. ....	143, 199, 200
Execution or judgment against .....	143, 337, 338
 <b>PAYMENT INTO COURT—</b>	
Money how paid in generally. ....	[196], [204], [231], [235]
When defendant may pay into Court in satisfaction .....	276
How paid in .....	270
Notice to be served. ....	271
How paid out to plaintiff .....	271
When plaintiff accepts amount paid in satisfaction .....	271, [18]
Payment in, in appeal case. ....	84
See "Accountant's Office."	
 <b>PAYMENT OUT OF COURT—</b>	
How paid out generally .....	399, 400, [231]
No money to be distributed or paid for costs except on order of Court or Judge. ....	374
Except money paid by way of satisfaction or amends and not belonging to infant or <i>feme covert</i> .....	374
Where order for administration or partition made by Local Master. [252], [254]	
In appeal case. ....	84
See "Accountant's Office."	
 <b>PENDING BUSINESS—</b>	
Generally .....	25, 26
When to be continued according to ordinary course of High Court .....	26, 404
When to be continued according to practice of Court in which brought. ....	26, 404
In Court of Chancery .....	26, 404
Special application in Chambers as to .....	26, 405
 <b>PERSONS OF UNSOUND MIND—</b>	
See "Lunatic," "Lunacy."	
 <b>PLAINTIFFS—</b>	
Joining plaintiffs, liberty as to .....	180, 215
Substitution or addition of .....	182
Indorsement of address, when suing in person. ....	196
"Plaintiff" applicable to every person asking relief otherwise than by way of counter-claim as a defendant. ....	123
 <b>PLEADING—</b>	
Rules substituted for those heretofore in use .....	217
Plaintiff to deliver statement of claim .....	218
Within what time .....	233
Defendant to deliver statement of defence, set-off or counter-claim .....	218
Within what time .....	236
Plaintiff to deliver reply .....	243
Statements to be brief .....	219
Costs where unnecessary prolixity .....	219



PAGE.	
107	107
107	107
253	253
254	254
254	254
254	254
256	256
143	143
143	143
143, 153	143, 153
143, 164	143, 164
143, 199, 200	143, 199, 200
143, 337, 338	143, 337, 338
270	270
270	270
271	271
271	271
271, [18]	271, [18]
84	84
399, 400, [231]	399, 400, [231]
Court or	374
belonging	374
or. [252], [254]	84
25, 26	25, 26
26, 404	26, 404
26, 404	26, 404
26, 404	26, 404
26, 405	26, 405
180, 215	180, 215
182	182
186	186
than by	123
217	217
218	218
233	233
218	218
236	236
243	243
219	219
219	219

PAGE.	
220	Defendant may set up by counter-claim any right or claim, whether sounding in damages or not
	See "Counter-claim."
220	Every pleading to contain concise statement of material facts
221	What pleadings should contain
222	May be printed or written, or partly printed and partly written
222	Only 4 copies allowed exclusive of draft
222	To be printed if more than 3 copies
223	How delivered
223	Relief claimed to be specifically stated
223	General relief may also be prayed
224	Distinct claims or causes of complaint to be stated separately and distinctly
224	Contents of any document, how to be stated
224	Malice, fraudulent intention, or knowledge, how to be stated
224	Notice to be alleged as a fact, unless form or precise terms material
225	Implied contract, how to be stated
225	Matter of fact which law presumes in favour of pleader need not be alleged unless it has been specifically denied
225	When right of any other party must be specifically denied
226	Bare denial of contract to be denial of the contract in fact not of legality or sufficiency
226	No plea or defence to be pleaded in abatement
227	No new assignment to be necessary or used
227	Amendment substituted therefor
227	Defendant in possession need not plead title
227	If defence depends on equitable estate against title asserted by plaintiff, should plead it
227	Plea of not guilty by Statute not affected by rules
228	Admissions how to be made
228	Facts relied on, not appearing in previous pleading to be alleged
228	Grounds of defence or reply which would take opposite party by surprise, or raise new issues to be alleged
229	Silence of a pleading no admission of facts in pleading of opposite party
229	No new ground of claim to be raised, or fact inconsistent with previous pleading to be alleged except by way of amendment
230	Delivering any pleading or proceeding includes filing

## MATTERS ARISING PENDING THE ACTION—

230	Ground of defence arising after action brought, how pleaded
231	Ground of defence to set-off or counter-claim arising after statement of defence delivered, plaintiff may reply or amend statement of claim
231	Within what time
231	Ground of defence arising after delivery of statement of defence, defendant may deliver further defence or amend within 8 days
232	Ground of defence arising after 3 weeks from delivery of statement of defence, plaintiff may, within 8 days after the same has arisen deliver further reply or amend statement of claim
232	Such amendments, how made
232	Leave of Court or Judge, when required
232	Plaintiff may confess ground of defence arising after action brought
232, [16]	Form of confession
233	Plaintiff entitled to costs up to time of defence being pleaded
394	Time for delivering or amending may be enlarged by consent
394	Delivery or amendment of during long vacation
	See "Defence," "Reply and Subsequent Pleadings," "Amendment of Pleadings," "Demurrer."

## PLEADING MATTERS ARISING PENDING THE ACTION

See "Pleading," "Matters arising pending the Action."

## PLEADINGS, CLOSE OF

	PAGE.
<b>POSSESSION—</b>	
Writ of .....	336, 354
Delivery of, in mortgage suits .....	[218], [223]
By purchaser, how obtained .....	[237]
<b>PRACTICE—</b>	
Where no special provision by Act or Rules .....	27
Assimilation of Common Law to Chancery .....	27
General enactments as to .....	30-37
Criminal procedure, unaltered .....	121, 402
Exceptions from the rules .....	402
Non-compliance with rules .....	398
Existing forms and methods of, when not inconsistent with Acts and rules, continued .....	99
Proceedings and applications may, subject to rules, be taken and made as if Act had not passed .....	126
<b>PRESIDENT—</b>	
Of High Court .....	20
Of Divisional Court .....	20
<b>PRINTING—</b>	
Proceedings to be printed pica type, leaded .....	392
Of appeal books .....	83, 84
<b>PROCEDURE BOOK—</b>	
Appearance to be entered in .....	164
<b>PRODUCTION OF DOCUMENTS .....</b>	
See "Discovery and Inspection."	279
<b>PROHIBITION—</b>	
Definition of .....	47
Injunction may be ordered instead of .....	47
No proceeding to be restrained by .....	44
<b>PURCHASE MONEY—</b>	
Interest, when payable .....	[336]
<b>QUEEN'S BENCH, COURT OF—</b>	
United with other Courts .....	19
New title of .....	20
<b>QUESTIONS OF LAW—</b>	
Generally .....	294-297
See "Special case."	
Demurrer .....	255-264
Motion for judgment .....	324-329
<b>REAL ESTATE—</b>	
Amendments of law as to .....	48-58
<b>RECEIVERS—</b>	
May be appointed by interlocutory order .....	51
Appointment, duties, practice .....	56-58
Writ should be indorsed claiming .....	57
Proceedings upon order for appointment of .....	[197]
Bond to be brought in, and to be to Master .....	[197]
Any party to suit may propose person as .....	[197]
At time appointed Master to determine as to receiver and settle security .....	[197]
Appointment to be signed, but no report made .....	[197]

## [301]

	PAGE
Appointment to be filed and effect of .....	[197]
Tenants, how made to attonn .....	197
Disturbing possession of receiver .....	198
Salary, how fixed .....	199
Accounts should be passed regularly .....	199
Enforcing payment of balances .....	199
Sureties for, how discharged .....	199
Master may fix times for passing accounts .....	[250]
 <b>RECORD—</b>	
Withdrawing .....	241, 243
 <b>RECORD, COURT OF—</b>	
High Court to be a .....	23
Definition .....	23
Courts of Queen's Bench and Common Pleas were .....	24
 <b>REDEMPTION, JUDGMENT FOR—</b>	
Powers of Master under .....	332
Consequences of default in payment under .....	333
Further proceedings where plaintiff foreclosed .....	333
Times allowed for in mortgage suits .....	[228]
Default in, effect of .....	[232]
<i>See</i> "Mortgage Suits."	
 <b>REFEREES—</b>	
Generally .....	97-98, 106, 308, 309
<i>See</i> "Official Referees."	
 <b>REFERENCE—</b>	
By Judge of Assize in County Court cases .....	90
"Any question" may be referred .....	91
Meaning of terms, and cases .....	92
Where local examination necessary .....	95
Action for work, counter claim for damages .....	95
Appeal from reports .....	95
Form of order under secs. 47 and 48 .....	95
Report, form of .....	95
motions respecting .....	95
Judgment after trial of issues .....	96
Discovery after order of reference .....	96
If one issue in action proper for reference all may be referred .....	94
Questions of fraud .....	94
Account .....	94
Other cases .....	95
 <b>RELIEF—</b>	
Equitable relief to plaintiff .....	30, 31
defence to be allowed, as in Chancery .....	32
Common Law rights, recognition of .....	47
Defendant, power to give relief to, as in an independent suit .....	32-44
All remedies to be granted and multiplicity of suits avoided .....	47
Parties need not all be interested in .....	180-184
Indorsement on writ of relief claimed .....	127, 129
Statement of claim and counter-claim, specifying relief in .....	218, 233
 <b>RENEWAL OF WRIT—</b>	
Writ of summons in force for 12 months only .....	144
Order for further time to serve, when granted .....	144, 145
Writ, how renewed .....	144
Effect of renewal .....	144
What evidence of renewal .....	144

	PAGE.
<b>RENTS AND PROFITS—</b>	
Master may take account of, without special direction .....	[184]
May set occupation rent .....	[184]
Mortgagee in possession liable to account for .....	[226]
Occupation rent, Master may set without special direction.....	[184] [226]
Repairs and improvements, Master may take account of, without special direction .....	[184]
Mortgagee, when entitled to allowance for.....	[227]
<b>REPLY AND SUBSEQUENT PLEADINGS—</b>	
Reply, within what time to be delivered.....	243
No pleading subsequent to reply without leave.....	244
Pleading subsequent to reply to be delivered within 4 days .....	244
<b>REPORT ON SALE—</b>	
Form of .....	[202]
<b>RESERVED BIDDING—</b>	
Master may fix.....	[201]
<b>REVENUE—</b>	
Proceedings on Crown or Revenue side of Queen's Bench or Common Pleas not affected by Act .....	121
Rules do not apply to proceedings on Revenue side of Queen's Bench or Common Pleas Divisions.....	402
<b>REVISION OF TAXATION—</b>	
In what cases .....	386
Mode of proceeding to obtain .....	386
<b>RULES OF COURT—</b>	
In schedule, when to come into operation .....	99
How annulled or altered.....	99, 100
Judges may make, for certain purposes.....	99, 100, 101
Existing powers of Judges as to making preserved.....	101
What provisions of Statutes may be modified by.....	101
Lieutenant-Governor may authorize certain Judges to make.....	101
Council of Judges to report annually .....	102
How cited .....	404
<b>RULES, EXCEPTIONS TO—</b>	
Not to apply to criminal proceedings, or proceedings on Crown or Revenue side of Queen's Bench or Common Pleas Divisions.....	402
<b>RULES OF LAW—</b>	
Declaration of various .....	30
<b>SALES—</b>	
Proceedings under order for.....	[199], [233]
Advertisement, contents of and how brought in .....	[200], [233]
Proceedings on appointment to settle .....	[201]
Conditions of sale.....	[201]
Reserved bidding .....	[201], [233]
Who entitled to bid .....	[202], [233]
Publication of advertisement.....	[202], [233]
Master may sell when no auctioneer .....	[202]
Purchaser to sign agreement.....	[202]
Deposit, to whom paid.....	[202]
Auctioneer's affidavit .....	[202]
Report on sale.....	[202], [234]
Sale, how objected to.....	[203], [234]
Biddings, when opened .....	[203], [235]

PAGE.
[184]
[184]
[226]
[184], [226]
out special
[184]
[227]
243
244
244
[202]
[201]
Common
121
's Bench
402
386
386
99
99, 100
99, 100, 101
101
101
101
102
404
402
30
[199], [233]
[200], [233]
[201]
[201], [233]
[202], [233]
[202], [233]
[202]
[202]
[202]
[202]
[202], [234]
[203], [234]
[203], [235]

	PAGE.
Payment of purchase money .....	[235]
Possession, how obtained by purchaser .....	[204], [237]
Abstract of title, when to be delivered .....	[204]
<i>See</i> "Abstract of Title."	
In mortgage cases .....	[216]
<i>See</i> "Mortgage Suits."	
Power of Master under decree for .....	[332]
Trustees to have conduct of, in suit for administering trusts .....	366
<b>SALARIES—</b>	
Orders in Council as to, to be laid before Assembly .....	119
<b>SCANDAL—</b>	
Striking out scandalous matter .....	246
<b>SEAL—</b>	
Of Supreme Court .....	23
Of Deputy Clerks of the Crown and Deputy Registrars .....	98
<b>SECURITY FOR COSTS—</b>	
Statutes relating to .....	378
Plaintiff out of jurisdiction .....	378
Having property within .....	379
Mis-description of plaintiff .....	379
Second suit for same cause of action .....	380
Husband and wife .....	380
By a Company .....	380
Solicitor and client .....	381
Interpleader .....	381
Waiver of right to .....	381
Order for, how obtained .....	381, 382
Form of order .....	381
Default in giving ..	382
Form of bond .....	382
To be, to party requiring security .....	382
Amount of security to be \$400 ..	382
When ordered where costs of former proceeding are paid .....	[121], [122]
<b>SEPARATE ESTATE—</b>	
<i>See</i> "Married Women."	
<b>SEQUESTRATION—</b>	
Writ of ....	335, 336, 337
<b>SERVICE—</b>	
Of pleadings and other proceedings, during what hours of the day .....	394
Of papers in appeal .....	83
Of counter-claim .....	239
<i>See</i> "Service, Writ of Summons."	
<b>SERVICE OUT OF ONTARIO—</b>	
In what cases allowed .....	155, 156, 157, 158, 159
Material necessary on motion for .....	159
Time for entering appearance .....	160
Court may direct service in any other manner, or fix other time for	
defending .....	161
Allowances of service to be obtained after, not before service .....	161
Notice in lieu of service to be served in same manner .....	161
<b>SERVICE, WRIT OF SUMMONS—</b>	
On partners .....	143
Within what time .....	144
Time may be extended .....	144

	PAGE.
Not required where solicitor accepts and undertakes to appear .....	146
How to be effected .....	147
Personal service, when dispensed with .....	147
Substitutional service, when granted .....	147, 148
By advertising .....	149
On married women .....	149
When infant interested .....	150, 151
Upon official guardian .....	151
On lunatic, by serving committee .....	152
On partners .....	153
On corporation or society .....	153
In action to recover land .....	154
Day of service to be indorsed on writ .....	154
Affidavit of service to state day on which indorsement made .....	155
To be proved, before proceedings on default of appearance .....	170
See "Service out of Ontario."	
SENT-OFF—	
Prior to Act .....	34
See "Counter-claim."	
SETTING ASIDE—	
Irregular proceedings .....	398
Judgment by default .....	269
Ex parte verdict .....	305
Judgment wrongly entered .....	324
SETTLED ESTATES—	
Jurisdiction of Court of Chancery as to .....	[118]
Mode of applying to Court .....	[118]
Where infants or married women interested .....	[119]
SITTINGS OF COURT—	
Three each year .....	400
Michaelmas sittings, when to begin and end .....	400
Hilary sittings, when to begin and end .....	400
Easter sittings, when to begin and end .....	400
Judges may shorten or lengthen periods for holding sittings .....	400
When rule to apply to Chancery Division .....	400
Divisional Courts may sit at other times .....	401
Sittings of vacation Judges .....	401
County Courts, sittings of .....	403
SOLICITORS—	
Acceptance of service by .....	146
Undertaking to appear .....	146
To state place of business in appearance .....	163
Not appearing pursuant to undertaking, liable to attachment .....	164
Change of, Equity practice to prevail .....	62
Privileges of existing, continued .....	115
To be officers of the High Court .....	115
Court to exercise jurisdiction over .....	115
Suing out writ of summons, to indorse name .....	134, 135
Changing solicitor .....	135
On demand to declare if writ issued with his privity .....	139
See "Writ of Summons."	
Act respecting, R. S. O., c .....	[140]
When Court will strike off roll for misconduct .....	[124]
Orders of Court as to .....	[125]
Court may call on to answer matters appearing on affidavit .....	[125]
Taxation of costs of .....	[125]
Bill to be delivered one month before solicitor can sue .....	[125]
Court may allow action earlier, when .....	[132]

PAGE.	
146	at .....
147	147
147	147
148	147, 148
149	149
149	149
150, 151	150, 151
151	151
152	152
153	153
153	153
154	154
154	154
155	155
155	155
170	170
34	34
398	398
269	269
305	305
324	324
[118]	[118]
[118]	[118]
[119]	[119]
400	400
400	400
400	400
400	400
400	400
401	401
401	401
403	403
146	146
146	146
163	163
164	164
62	62
115	115
115	115
115	115
134, 135	134, 135
135	135
139	139
[140]	[140]
[124]	[124]
[125]	[125]
[125]	[125]
[125]	[125]
[125]	[125]
[132]	[132]

	PAGE.
What constitutes delivery .....	[126]
Party chargeable may, within one month obtain order for taxation .....	[127]
Effect of special agreement .....	[128]
What bills can be referred .....	[128]
Disputing retainer, where .....	[128], [135]
Order upon terms after month has expired .....	[129]
No order after verdict on expiry of twelve months, unless special circumstances .....	[129]
Client entitled to taxation after twelve months, where .....	[129]
Costs of taxation if one-sixth taxed off .....	[129], [130]
What payments allowed on taxation .....	[130]
Bill referred for taxation not to be altered without leave of Court .....	[130]
What order for taxation to be read as containing .....	[131]
Special circumstances may be certified .....	[131]
Where bill referred under special circumstances, special direction as to costs may be given .....	[131]
Delivery of bill may be ordered .....	[131]
And delivery of papers in possession of solicitor .....	[131]
On application for order to tax, not necessary to prove contents of bill ..	[132]
Party, other than principal, liable to pay, may have bill taxed .....	[132], [133]
In such case special circumstances may be taken into consideration .....	[133]
Court may order delivery to third party, when .....	[133]
Bill once taxed not again referred, unless special circumstances .....	[134]
When Court will order taxation after payment .....	[134]
Officer of one Court may request assistance of another in taxing .....	[135]
Applications for delivery or taxation, how styled .....	[135]
SPECIAL CASE—	
Parties may state for opinion of Court .....	294
Parties may agree to pay money pursuant to finding on .....	295
What to contain and form of .....	295, 296
What inferences of fact or law Court may draw .....	296
Court may decide questions of law on, before directing trial of issue of fact or making a reference .....	296
Where married woman, infant or person of unsound mind interested leave to set down necessary .....	296
How entered for argument .....	297, [52]
Proceedings on, in Chancery .....	[119]
What Court will decide on .....	[119]
SPECIAL CIRCUMSTANCES—	
Master may report without special direction .....	[184]
SPECIFIC PERFORMANCE—	
Damages in addition to or substitution for, when granted .....	[101]
Of contract by lunatic when decreed .....	[115]
Court may declare what parties are trustees of lands comprised in any suit .....	[160]
STAMPS—	
Cancellation of .....	108
STATEMENT OF CLAIM—	
Appearance to state if delivery of required .....	163
Delivery of, how regulated .....	233
Where defendant does not require delivery of .....	234
To be delivered within 3 months after appearance .....	234
Costs where plaintiff delivers without being required to do so .....	234
What sufficient where writ specially endorsed .....	235
Delivery of further statement may be ordered .....	235
STATEMENT OF DEFENCE .....	
See "Defence."	236-240
V	



	PAGE.
STATUTES—	
Relating to existing Courts to be read as applying to High Court.....	102
Pleading "not guilty by Statute" .....	227
STATUTE OF LIMITATIONS—	
Express trusts.....	48
Pleading .....	228
STATUTES REPEALED—	
Imp. Act, 5 and 6, W. IV., c. 62, ss. 15, 16 .....	122
R. S. O., c. 25, s. 3, as to Judges appointed after certain date.....	122
Any Act inconsistent with Judicature Act.....	122
32 Vic., c. 22, s. 1 .....	116
STAY OF PROCEEDINGS—	
Order for, substituted for prohibition and injunction .....	44, 45
F frivolous and vexatious actions .....	45
Application must be in same Division .....	45
Administration suit, mortgagee proceeding to obtain possession .....	45
Interpleader action .....	46
Proceedings pending in Foreign Court.....	46
Default in production.....	288
Compromise of proceedings .....	46
SUBPOENA AD TEST—	
Compelling attendance of witness .....	120
SUBSTITUTIONAL SERVICE—	
When leave for granted ... ..	147, 148
SUMMONS, WRIT OF—	
<i>See</i> "Writ of Summons."	
SUPREME COURT OF CANADA—	
Limitation of right of appeal .....	87
SUPREME COURT OF JUDICATURE—	
Constitution of .....	19
Consolidation of Courts into .....	19
Division into High Court and Court of Appeal .....	19
SURROGATE COURTS—	
Judges may make rules as to appeals from .....	100
Registrars of, not to draw or advise on wills .....	109
Fees payable to Judge may be commuted .....	118
Where no commutation, excess over \$1000 to be paid to Treasurer.....	118
Junior Judge may be paid part of excess .....	118
Orders as to commutation to be laid before Assembly.....	119
SURETY—	
For payment of mortgage, relief against.....	[206]
TAXATION OF COSTS—	
Where party entitled to, neglects to bring in bill .....	387
What costs to be allowed .....	387
Taxation of, between solicitor and client .....	388
Rules of Courts merged in High Court as to costs to remain in force where not inconsistent with Act .....	388
Party dissatisfied may apply to taxing officer to review .....	389
Proceedings upon application to review.....	390
Application to Judge to review .....	390

# INDEX.

[307]

## PAGE.

court.....	102
.....	227
.....	48
.....	228
.....	122
e.....	122
.....	122
.....	116
.....	44, 45
.....	45
.....	45
on.....	45
.....	46
.....	46
.....	288
.....	46
.....	120
.....	147, 148
.....	19
.....	19
.....	19
.....	100
.....	109
.....	118
.....	118
.....	118
.....	119
.....	[206]
.....	387
.....	387
.....	388
in in force	388
.....	389
.....	390
.....	390

Evidence on such application .....	391
Costs taxed under special statutes .....	391
See "Costs."	

## TAXATION, SOLICITOR AND CLIENT—

Solicitor to give credit for all moneys received .....	388
Master to tax costs of reference and certify by whom payable.....	388
Solicitor not to prosecute action pending reference .....	388
On payment to deliver over deeds, books, papers, etc .....	388
Order for, how obtained.....	388
See "Solicitor."	

## TAXING OFFICERS—

Powers and duties of .....	385, 387
Discretion of.....	391
Revision of costs by.....	386
To arrange what parties should attend on taxation.....	387
Court may direct supervision over.....	389

## TENANT FOR LIFE—

Waste by .....	48
----------------	----

## TERMS—

Abolished except as a measure of time.....	63
--	----

## TESTING WRITS—

Generally .....	128
Concurrent writs .....	138

## THIRD PARTY—

Claim by defendant against generally .....	32-44, 205-210, 239
Counter-claim against plaintiff and third party.....	32-44, 239
Claim by defendant against, for relief over.....	205-210
Execution against.....	342
Default of pleading, when questions affect.....	269

## TIME—

Computation of .....	392
Computation of, in Court of Appeal.....	84
"Month" means calendar month where not otherwise expressed.....	392
Holidays, when not reckoned in computation of time.....	393
First day exclusive and last inclusive, when .....	393
When time limited expires on Sunday.....	393
Time for delivering or amending pleadings may be enlarged by consent..	394
Service, during what hours of the day.....	394
Time of long vacation not reckoned for certain purposes.....	394
Court or Judge may enlarge or abridge time, when.....	395
Costs of application to extend time .....	395

## TITLE—

Defendant need not produce for inspection document relating to his own title .....	286
Defendant to action for land need not shew title unless, etc .....	227
Investigation of .....	[204], [235]
See "Abstract of Title."	

## TRANSFER OF ACTIONS—

May be made at any time .....	66
Provisions of Administration of Justice Act.....	66
From one Division to another .....	360
Where order for administration .....	360

## TRESPASS—

PAGE.

Injunction against .....	52, 55
Mortgagor suing for .....	50

## TRIAL—

Facts proved must entitle in law to judgment .....	87
Modes of, when Chancery and when Common Law practice to prevail ..	87
Various methods of, enumerated .....	91
Cause entered for, may be withdrawn by consent .....	243
Plaintiff to name place for trial in statement of claim .....	297
Notice of trial, when to be given .....	297, 301
Different modes of trial may be ordered in any action .....	298, 299, 300
Trial of question of fact by a jury to be before a single Judge .....	301
What notice of trial to state, and form of it .....	301, [21]
Length of notice .....	301
Action may be entered for trial, when .....	302
Copy of pleadings for use of Judge .....	302
Actions from Chancery Division may be tried at separate time .....	302
With whom to be entered .....	302, 303
Proceedings on entering action for trial .....	303
Where plaintiff appears and defendant does not .....	303
Where defendant appears and plaintiff does not .....	304
Verdict or judgment, where one party does not appear, may be set aside on terms .....	305
Where material fact not proved by mistake or accident .....	305
Judge may postpone or adjourn trial ..	306
“ may, at or after trial, direct judgment to be entered or adjourn case for further consideration .....	307
How findings of fact to be entered .....	307
Certificate for entering judgment .....	307
Proceedings where cause referred to referee .....	308
Evidence, how taken before referee .....	308
Referee may submit questions for opinion of Court .....	309
Court may require explanations or reasons from referee .....	309

## TRUST—

Action by or against trustees on behalf of trust .....	185
Parties to action for execution of .....	200
Limitation as to trusts .....	48
Special indorsement of liquidated claim on .....	131

## TRUSTEES—

May sue or be sued without joining parties beneficially interested .....	185
Where action to execute trusts .....	185
“ “ set aside settlement .....	186
In mortgage suits .....	186, 187
If the estate to be sold .....	187
Applications for advice .....	[177]
How made, and costs of .....	[177]
Trustee acting on advice, when indemnified .....	[177]
What questions Court will decide .....	[178]
Remuneration of .....	[178]
Usual scale of .....	[178], [179]
Judge may grant, though no suit .....	[179]
See “Trustee Acts,” “New Trustees,” “Executors.”	

## TRUSTEE ACTS—

Payment into Court by debtor, trustee, etc., in case of conflict as to validity of assignment of debt, etc. ....	50
English Act for Relief of Trustees, 1847 .....	[136]
Act for Further Relief, 1849 .....	[143]
English Trustee Act, 1850 .....	[145]
Trustee Extension Act, 1852 .....	[173]
High Court of Justice may exercise jurisdiction under .....	[137]

PAGE.	
52, 55	
50	
87	
prevail..	87
91	
243	
297	
297, 301	
298, 299, 300	
301	
301, [21]	
301	
362	
302	
302	
302, 303	
303	
303	
304	
set aside	
305	
305	
306	
adjourn	
307	
307	
307	
308	
308	
309	
309	
185	
200	
48	
131	
185	
185	
186	
186, 187	
187	
[177]	
177	
177	
178	
178	
[178], 179	
179	
50	
[136]	
[143]	
[145]	
[173]	
[137]	

	PAGE.
Payment into Court or transfer of stocks under .....	[136], [143]
Persons entitled to pay money into Court under .....	[138], [143]
Persons not so entitled .....	[138]
Mortgagor cannot. ....	[148]
Act not compulsory. ....	[138]
Payment in, how made .....	[138]
English General Orders as to .....	[138], [139]
Effect of payment in, of trust fund .....	[139]
Payment out. ....	[140]
Who entitled to notice. ....	[140]
Costs of proceedings .....	[141]
Out of what fund costs payable .....	[142]
Meaning of words used in Trustee Act, 1850. ....	[145], [146], [147]
When mortgagee a trustee within the Act. ....	[148]
When Court will declare infant heir of vendor trustee, for purchaser. ....	[148]
Lunatic trustees or mortgagees of lands, Court may make vesting orders. ....	[148]
Orders may be made as to stock and choses in action held by lunatic trustees or mortgagees .....	[149]
And as to stocks standing in name of deceased person when personal representative lunatic. ....	[150]
And as to lands of infant trustee or mortgagee. ....	[150]
When decree for sale of real estate for payment of debts ..	[159]
May declare who are trustees of lands comprised in any suit ..	[160]
May appoint new trustees .....	[162]
See "New Trustees."	
No escheat of property held upon trust or mortgage .....	[168]
Act does not prevent escheat of beneficial interest .....	[169]
Money of infants or persons of unsound mind to be paid into Court. ....	[169]
Costs may be paid out of estate .....	[170]
Court may order suit to be instituted. ....	[171]
As to vesting lands out of jurisdiction .....	[172]
After decree for sale may make vesting order instead of conveyance by parties .....	[122], [173]
May make vesting order on refusal of trustee to convey or release .....	[174]
For transfer or receipt of dividends on stock in name of infant trustee ..	[174]
On neglect of trustee to transfer stock, order vesting right to transfer ..	[174]
Order vesting right to transfer on neglect by executor .....	[175]
Companies to comply with orders .....	[175]
Companies obeying orders indemnified. ....	[175]
Order may be made releasing or disposing of contingent rights of lunatic trustees or mortgagees of lands .....	[149]
Or of contingent rights of infant, trustee, or mortgagee of lands .....	[150]
Vesting order made where sole trustee out of jurisdiction, or cannot be found .....	[151]
Where joint trustees, and one absent or cannot be found. ....	[151]
Contingent rights released where sole trustee absent or cannot be found ..	[152]
Where joint trustees, and one absent .....	[152]
Vesting order where joint trustees, and it is not known which survived. ..	[152]
Or where not known whether survivor living or dead .....	[153]
Vesting order where trustee dead intestate and heir unknown .....	[153]
Where lands subject to contingent right of unborn trustee .....	[153]
When mortgagee has died and money has been paid, Court may make vesting order, when. ....	[154]
Court may appoint person to convey, when. ....	[155]
Or to transfer or sue when trustees of stock or chose in action out of jurisdiction, or uncertain .....	[156]
Or when trustee of stock or chose in action refuses to transfer. ....	[157]
Or where stock stands in name of deceased person, and the personal representative is absent, or uncertain, or refuses to transfer. ....	[158]
Effect of order vesting legal right to transfer stock .....	[158]
Court may direct how right to transfer stock is to be exercised .....	[161]
Effect of order vesting legal right in a chose in action .....	[169]

URGENCY—

Hearing in vacation of urgent cases. ....	64, 402
Vacation Judges' power to act at other times .....	402
General power to shorten times for proceedings .....	395

	PAGE.
VACATIONS—	
Lieutenant-Governor in Council may regulate .....	64
In Chancery .....	64
At Common Law .....	64
Judges to sit during .....	64, 401
Computation of time where vacations, etc., intervene .....	394
Delivery or amendment of pleadings during .....	394
Time of, not reckoned for certain purposes .....	394
Business which may be disposed of .....	401, 402
VENUE—	
No local venue, except in ejectment .....	297
VERDICT—	
Motion for new trial after .....	321, 323
Setting aside verdict obtained in absence of opponent .....	305
VESTING ORDERS—	
Court of Chancery may make .....	[122]
Evidence, purchaser may call for before accepting .....	[122]
See "Trustee Act."	
WARRANT—	
Form of Master's .....	[191]
WASTE—	
Definition of .....	48
Rights of tenant for life without impeachment of .....	48
Injunction to stay against adverse legal title .....	[101]
WITNESS—	
Compelling attendance of .....	120
In general to be examined in open Court .....	310
Cross-examination of deponents .....	311-319
Attendance of, before referee .....	308
See "Commissioners to Examine Witnesses."	
WRITS—	
Dating and testing of writs generally .....	128
Execution, writs of .....	334-343
See "Execution."	
WRIT OF ATTACHMENT—	
When judgment enforceable by .....	336
Under what circumstances issued .....	345
Leave of Court or Judge necessary .....	345
WRIT OF DELIVERY—	
What judgments enforced by .....	336
How issued and enforced .....	355
WRIT OF EXECUTION—	
What included under .....	337
WRIT OF FIERI FACIAS—	
Generally .....	334-335
To have same force and effect as heretofore .....	344
See "Execution."	

PAGE.
64
64
64
64, 401
394
394
394
401, 402
297
321, 323
305
[122]
[122]
[191]
48
48
[101]
120
310
319
308
128
334-343
336
345
345
336
355
337
334-335
344

	PAGE.
WRIT OF POSSESSION—	
What judgments enforced by .....	336
In what cases to issue .....	354
Effect of .....	354
WRIT OF SEQUESTRATION—	
Generally .....	335
What judgments enforced by .....	336
WRIT OF SUMMONS—	
Every action to be commenced by .....	127
Statement of claim to be indorsed .....	127
Costs where prolix or other forms used .....	127
Form where served in Ontario .....	127, [1]
Form where served abroad .....	127, [2]
Form of notice in lieu of service .....	127, [2]
Service out of jurisdiction .....	128
To be tested in name of President and on day of issue .....	128
Court or Judge may amend at any stage .....	129
May issue from office in Toronto or outer County .....	136
What officers to issue .....	136
Place for entering appearance to be stated .....	137
To be prepared by solicitor .....	137
May be written or printed, or partly written, partly printed .....	137
To be signed and sealed by officer issuing .....	137
When to be deemed issued .....	137
On sealing, copy to be left with officer .....	138
Entry of every writ to be made in Process Book .....	138
Concurrent writ, when to be issued .....	138
For service abroad with one for service within jurisdiction .....	139
Solicitor on demand to declare if issued with his privity .....	139
To disclose profession and abode of plaintiff .....	139
Proceedings stayed where writ issued without solicitor's privity .....	142
Where issued in name of partnership, names and residences of members of firm to be given on demand .....	143
Renewal of .....	144
See "Renewal of Writ."	
Loss of writ .....	145
WRIT OF SUMMONS, SPECIALLY INDORSED—	
When plaintiff may sign judgment on non-appearance to .....	170
Defence by one of several defendants .....	171
Leave to sign judgment .....	174
What sufficient indorsements .....	174
What sufficient statement of claim .....	235
WRIT OF VENDITIONI EXPNAS—	
May be issued and executed as heretofore .....	344

ADDENDA ET CORRIGENDA.

---

Page 95—In the heading "Appeal from Orders under Secs. 47 and 48," the word  
*Orders* should be *Reports*.

" 157—At end of line 11, add "See also as to this point, O. XLIX, r. 8,"

" [109], line 21—For *secures*, read *seems*.

" [187], last line—Add *6* before *Pr. R.*

" [207], line 13—For *date* read *sales*.



47 and 48," the word

O. XLIX, r. 8."